

RIMAC & MARTIN

A Professional Corporation

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Attorneys for Plaintiff

HUGO SLUIMER

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

E-FILING

HUGO SLUIMER,

Plaintiff,

v.

VERITY, INC., a corporation, and THE
VERITY INC. CHANGE IN CONTROL AND
SEVERANCE BENEFIT PLAN,

Defendants.

)
) **CASE NO. C 081220 SI**

)
) **DECLARATION OF WILLIAM REILLY**
) **IN SUPPORT OF MOTION FOR**
) **ATTORNEY'S FEES, COSTS (29 U.S.C.**
) **§ 1132(g)) AND PREJUDGMENT**
) **INTEREST (28 U.S.C. § 1961)**

) Date: September 26, 2008

) Time: 9:00 a.m.

) Ctrm: 10, 19th Floor

)
) The Honorable Susan Illston

1 I, William Reilly, declare as follows:

2 1. I am an attorney at law, duly licensed and admitted to practice before the courts in
3 the States of California and Colorado, the United States District Court for the Northern, Central,
4 Eastern and Southern Districts of California and the Ninth and Fourth Circuit Courts of
5 Appeal. I am associated with the law firm of Rimac & Martin, attorneys of record for plaintiff
6 HUGO SLUIMER. I have personal knowledge of the facts set forth in this declaration, and if
7 called as a witness I could competently testify thereto.

8 2. My educational background is University of Colorado (Political Science, 1989);
9 University of Denver college of Law (J.D., 1994). I passed the California Bar exam the summer
10 after my 1994 graduation from law school.

11 3. From 1996 to the present I have practiced ERISA litigation, first with Bannan,
12 Green, Smith, Frank & Rimac and then with Rimac & Martin, P.C. I have been litigating ERISA
13 cases throughout the United States since 1996. I estimate I have handled in excess of one
14 hundred (100) of these matters to date. At any given time, my current practice consists of up to
15 40% ERISA related matters.

16 4. I have worked extensively on ERISA litigation since January 1996. I have worked
17 on and/or was solely responsible for the following ERISA matters: *Alexander v. Provident Life &*
18 *Acc. Inc. Co.*, 153 F.3d 718 (4th Cir. 1998); *Louderback v. Litton Indus., Inc.*, 504 F.Supp.2d
19 1145 (D.Kan. 2007); *Nelson v. UNUM life Ins. Co.*, 1999 Westlaw 33226241 (N.D. Cal, Sept.
20 22, 1999); *Nelson v. UNUM Life Ins. Co. of Amer., Inc.*, 529 U.S. 1109 (1998) (successfully
21 resisted cert.); *Nichols v. Unum Life Ins. Co. of Amer.*, 2003 Westlaw 22722819 (N.D.Cal., Nov.
22 12, 2003); *Nichols v. Unum Life Ins. Co. of Amer.*, 287 F.Supp.2d 1088 (N.D.Cal. 2003);
23 *Sommer v UNUM Life Ins. Co. of Amer.*, 173 F.3d 861 (9th Cir. 1999); *Sommer v UNUM Life*
24 *Ins. Co. of Amer.*, 35 Fed. Appx. 489 (9th Cir. 2002); *Sommer v. UNUM Life Ins. Co. of Amer.*,
25 537 U.S. 948 (2002) (successfully resisted cert.).

26 5. Rimac & Martin, P.C. took this case on a contingency fee basis. Therefore, since
27 approximately September 2007, Rimac & Martin, P.C. has received no compensation for our
28 work. Furthermore, if Plaintiff did not prevail in this case, Rimac & Martin, P.C. would receive

1 no compensation from Plaintiff.

2 6. At all times during this action, Rimac & Martin, P.C. has maintained its attorney
3 time records on a computerized billing system. Each attorney contemporaneously inputs the
4 tasks or series of tasks performed and the amount of time spent in the computer or on a time
5 sheet. Our computerized billing system contains a record of the work performed on the present
6 case. The computerized billing system shows for each time entry the date the service was
7 performed, the individual performing the service (identified by initials), the nature of the
8 services, and the time spent performing the services. Costs are also entered into that system and
9 are itemized. The client is not billed for in house copies or computerized research, such as
10 Westlaw.

11 7. Based on the above, my experience as an attorney, which includes many
12 discussions with other attorneys who handle ERISA benefits litigation for both plaintiff and
13 defendants, it is my opinion and belief that the reasonable value of my time at present is at least
14 \$450.00 per hour.

15 8. Attached as Exhibit A is a true and accurate copy of the firm's billing statements
16 in this case as of July 31, 2008, for which an award of fees and costs is sought. The statement is
17 a print-out of the inputted time records and costs in this case from our computerized billing
18 system as described above. All that time spent on this matter was reasonably incurred and
19 necessary to the representation of my client's interest. Those statements total \$145,445.00 in
20 attorneys' fees and \$899.10 in costs.

21 9. The billings statements do not reflect the time spent for August, 2008. My time,
22 as recorded on my time sheets is as follows:

23 August 5, 2008	calls and emails to and from co-counsel re 24 fees motion and client; review order	.5 hours
25 August 12, 2008	calls and emails to and from co-counsel re 26 fees motion and judgment; meet and confer with D's counsel re motion	.5 hours
27 August 13, 2008	calls and emails to and from co-counsel re 28 fees motion and proposed judgment; review and revise proposed judgment	.5 hours

1	August 14, 2008	calls and emails to and from co-counsel re fees motion and proposed judgment; call D's counsel re motion	.5 hours
2			
3	August 15, 2008	calls and emails to and from co-counsel re fees motion; prep exhibits for motion and email D's counsel re same	1.3 hours
4			
5			
6	August 18, 2008	calls and emails to and from co-counsel re fees motion and judgment; review and revise correspondence re same; emails to and from D's counsel re motion; draft motion	1.7 hours
7			
8	August 19, 2008	calls and emails to and from co-counsel re fees motion and judgment; review and revise Proposed judgment & correspondence re same; Review and revise Declarations in support of Motion; draft motion	2.1 hours
9			
10	August 20, 2005	call co-counsel re motion; emails to and from D's counsel re judgment and motion; and draft Reilly Dec.	1.9 hours
11			
12	August 21, 2008	meet with Kalkin; draft Kalkin Dec.; review and revise Dec.; review and revise P&A, Reilly and Gill Declarations	3.0 hours
13			
14	August 21, 2008	review and revise all documents and Exhibits; Prep for filing	1.5 hours
15			
16		Total	13.5 hours
17			

13.5 hours times at \$450 per hour equals an additional \$6,075.

10. In addition to this time, Kevin Gill of my office has expended for the month of August 2008, a total of \$2,280.00 in attorney's fees for a total of an additional \$8,355.00. Please see the Declaration of Kevin Gill filed herewith.

11. Thus, the total amount of costs incurred by Rimac & Martin, P.C. in this matter is \$899.10, and the total amount of attorney fees from September 2007 through August 22, 2008 is \$153,800.00, for a grand total of \$154,699.10 attorneys' fees and costs.

12. Based upon my experience as an attorney, which includes many discussions with other attorneys who handle ERISA benefits litigation for both plaintiff and defendants, it is my opinion and belief that the billing rates of \$400.00 - \$610.00 per hour sought by plaintiff's attorneys here for a contingent case of this type are within the normal range of fees charged by

1 attorneys in the Bay Area with similar experience, skill and reputation.

2 13. My opinion is also based upon a review of the following court orders, which,
3 pursuant to Federal Rule of Evidence 201, Plaintiff requests the Court to take judicial notice of.
4 True and correct copies of the orders are attached hereto as Exhibits B through D.

5 B. Judge Ware's order in the case of *Udd v. Vidinsky* (04-05080
6 N.D. Cal. 2006) approving attorney Dan Fienberg's billing rate of
\$495.00 per hour;

7 C. Judge Wilken's order in the case of *King v. Cigna Corporation*
8 (C 06-7025 N.D.Cal. 2007) approving attorney Julian M. Baum's
billing rate of \$450.00 per hour; and

9 D. Judge Chesney's order in the case of *Fleming v. Kemper* (03-
10 5135 N.D. Cal. 2005) approving Dan Feinberg's billing rate of
\$450.00.

11 14. I also direct the Court's attention to the Exhibits filed with the declarations of
12 Keith Ehrman and Cliff Palefsky, which confirm the reasonableness of Plaintiff's attorneys'
13 billing rates.

14 15. The Ninth Circuit has held that "determination of a reasonable hourly rate is not
15 made by reference to the rates actually charged the prevailing party. In determining a reasonable
16 hourly rate a court should be guided by the rate prevailing in the community for similar work
17 performed by attorneys of comparable skill, experience and reputation." *Chalmers v. City of Los*
18 *Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). The declarations of plaintiff's attorneys and other
19 ERISA attorneys regarding prevailing fees in the community are satisfactory evidence of the
20 prevailing market rate (*see United Steelworkers v. Phelps Dodge Corp.*, 896 F.2d 403, 407
21 (1990)), as are "rates determinations in other cases" (*see e.g. Mogck v. UNUM Life Ins. Co.*, 289
22 F.Supp.2d 1181, 1190-91(S.D.Cal. 2003)).

23 I declare under penalty of perjury under the laws of the United States that the foregoing is
24 true and correct.

25 Executed this 22nd day of August 2008, at San Francisco, California.

26
27 /S/ WILLIAM REILLY
28 William Reilly

EXHIBIT A

RIMAC & MARTIN, P.C.
 1051 DIVISADERO STREET
 SAN FRANCISCO, CALIFORNIA 94115
 TELEPHONE: (415) 561-8440
 FEDERAL TAX I.D. #94-3297441

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
 INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
09/04/07	BR	Review correspondence and administrative record.	2.5	1,125.00
09/20/07	BR	Telephone conference and email with Keith re case status and options.	0.8	360.00
09/21/07	BR	Review email from Keith re complaint and options and prepare response.	0.3	135.00
09/24/07	BR	Review email from Keith re stocks and agreements and prepare response.	0.3	135.00
10/01/07	BR	Review email from Keith and prepare response re status.	0.2	90.00
10/03/07	BR	Review email from Keith re case status.	0.1	45.00
10/09/07	BR	Review email from Keith re call with Hugo.	0.3	135.00
10/11/07	BR	Review email from Keith re conference call.	0.2	90.00
10/12/07	BR	Research re ERISA document request.	1.0	450.00
10/12/07	BR	Review plan documents re request.	1.0	450.00
10/12/07	BR	Prepare correspondence to plan re document request.	0.7	315.00
10/12/07	BR	Prepare for and participate in conference call with Keith and Hugo.	1.0	450.00

RIMAC & MARTIN, P.C.

August 15, 2008

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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
10/13/07	BR	Review emails from Hugo re document demand and Dutch court records and prepare response.	0.3	135.00
10/13/07	BR	Review Dutch court brief.	0.5	225.00
10/16/07	BR	Review emails from Hugo re Dutch court pleadings.	0.3	135.00
10/23/07	BR	Review email from Keith to Hugo re translation.	0.3	135.00
10/31/07	BR	Review email from Hugo re verify letter.	0.3	135.00
11/01/07	BR	Review email from Hugo.	0.1	45.00
11/01/07	BR	Prepare letter to Kanter.	0.5	225.00
11/02/07	BR	Prepare email to Hugo re Kanter.	0.2	90.00
11/06/07	BR	Telephone conference with Autonomy re document requests.	0.2	90.00
11/06/07	BR	Review letter from Kanter re prior letter.	0.1	45.00
11/12/07	BR	Review letter and documents from plan.	0.5	225.00
11/16/07	BR	Prepare email to Keith and Hugo re administrative record.	0.2	90.00
11/19/07	BR	Analyze purported administrative record.	1.5	675.00
11/19/07	BR	Review email from Hugo re record.	0.1	45.00
12/04/07	BR	Review email from Keith and Hugo re status.	0.5	225.00

RIMAC & MARTIN, P.C.

August 15, 2008

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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
12/05/07	BR	Review emails from Hugo and Keith re course of action.	0.2	90.00
12/05/07	BR	Research re conflict and abuse of discretion and substantial evidence.	3.0	1,350.00
12/05/07	BR	Prepare memos re conflict and abuse of discretion and substantial evidence.	3.0	1,350.00
12/12/07	BR	Review email from Keith re new authority.	0.3	135.00
12/12/07	BR	Review new 9th circuit case re conflict.	0.5	225.00
12/19/07	BR	Research re scope of review and arguments to expand Verity's purported record.	3.2	1,440.00
12/19/07	BR	Prepare memo re scope of review and arguments to expand Verity's purported record.	2.1	945.00
12/20/07	BR	Research re standard of review and arguments for de novo and severance cases.	2.6	1,170.00
12/20/07	BR	Prepare memo re standard of review and arguments for de novo and severance cases.	1.8	810.00
12/21/07	BR	Continue drafting memo/motion for summary judgment re scope and standard.	0.8	360.00
12/26/07	BR	Research re substantial evidence, bad faith and res judicata.	2.5	1,125.00

RIMAC & MARTIN, P.C.

August 15, 2008

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OUR FILE NUMBER 90-1
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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
12/26/07	BR	Prepare section re severance cases.	1.4	630.00
12/27/07	BR	Continue drafting memo/motion for summary judgment.	1.0	450.00
12/27/07	BR	Research re motion for summary judgment.	0.1	45.00
12/28/07	BR	Additional research re abuse of discretion.	1.0	450.00
12/28/07	BR	Prepare memo/motion for summary judgment re substantial evidence, bad faith and resjudicata.	2.5	1,125.00
12/28/07	BR	Review and revise memo/motion for summary judgment.	1.5	675.00
01/09/08	BR	Review email from Keith re initial disclosure.	0.4	180.00
01/11/08	BR	Telephone conference and emails with Keith re complaint and administrative record.	0.5	225.00
01/16/08	BR	Review email from Keith re administrative record.	0.2	90.00
01/16/08	BR	Prepare complaint.	0.8	360.00
01/17/08	BR	Review emails from Keith re Dutch lawyer.	0.3	135.00
01/17/08	BR	Review emails from Hugo re Dutch lawyer and prepare response.	0.4	180.00
01/17/08	BR	Continue drafting complaint.	0.3	135.00
01/18/08	BR	Continue drafting		

RIMAC & MARTIN, P.C.

August 15, 2008

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DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		complaint.	0.7	315.00
01/25/08	BR	Review and revise memo and complaint.	1.5	675.00
01/30/08	BR	Review and revise complaint.	1.5	675.00
01/30/08	BR	Continue drafting memo.	2.5	1,125.00
01/31/08	BR	Review and revise complaint.	1.0	450.00
01/31/08	BR	Finish drafting memo.	3.2	1,440.00
01/31/08	BR	Review emails from Keith re complaint and administrative record.	0.4	180.00
02/01/08	BR	Reveiw and revise memo.	1.4	630.00
02/01/08	BR	Prepare email to Mr. Sluimer re documents and complaint.	0.5	225.00
02/06/08	BR	Telephone conference with Keith re complaint and administrative record.	0.3	135.00
02/06/08	BR	Prepare letter to Keith re ERISA and record.	1.6	720.00
02/12/08	BR	Review and revise complaint.	1.2	540.00
02/13/08	BR	Telephoe conference and email with Keith re complaint and record.	0.4	180.00
02/26/08	BR	Telephone conference and emails with Keith re complaint and Dutch lawyer.	0.5	225.00
02/26/08	BR	Review and revise complaint.	0.3	135.00

RIMAC & MARTIN, P.C.

August 15, 2008

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DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
02/27/08	BR	Review email from Mr. Sluimer re complaint.	0.1	45.00
02/28/08	BR	Prepare summons, certification and cover sheet.	1.3	585.00
02/28/08	BR	Prepare complaint and summons for filing.	0.5	225.00
02/28/08	BR	Review email from Keith and Dutch lawyer re record.	0.3	135.00
02/29/08	BR	Telephone conference with Keith re Verity Corporate office.	0.3	135.00
02/29/08	BR	Review and revise complaint.	0.3	135.00
02/29/08	BR	Prepare complaint for service and filing.	0.3	135.00
03/03/08	BR	Review emails from Dutch lawyer to Hugo and Keith re Dutch court documents.	1.0	450.00
03/03/08	BR	Review initial documents from court and order.	0.6	270.00
03/12/08	BR	Prepare complaint and summons for service.	0.4	180.00
03/12/08	BR	Review email from Keith re complaint and summons and prepare reply.	0.2	90.00
03/13/08	BR	Review email from Hugo re translation and review documents.	1.2	540.00
03/13/08	BR	Review emails from Keith re translation and documents.	0.2	90.00

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August 15, 2008

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DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
03/27/08	BR	Telephone conference and emails with Keith re pleadings.	0.5	225.00
03/27/08	BR	Telephone conference and emails with defendant re pleadings.	0.2	90.00
03/27/08	BR	Research re defendant's firm and motion for summary judgment.	0.5	225.00
03/28/08	BR	Research re defendant's firm and contact southern California attorney.	0.9	405.00
03/28/08	BR	Prepare motion for summary judgment.	2.8	1,260.00
03/28/08	BR	Telephone conference and email with plaintiff's counsel re pleading.	0.3	135.00
03/28/08	BR	Telephone conference and email with Keith re pleading. ADR and motion for summary judgment.	0.5	225.00
03/28/08	BR	Prepare email to Hugo re pleading. ADR and motion for summary judgment.	0.3	135.00
03/31/08	BR	Review email from Hugo re documents.	0.5	225.00
03/31/08	BR	Continue drafting motion for summary judgment.	3.8	1,710.00
04/01/08	BR	Continue drafting motion for summary judgment.	3.5	1,575.00
04/02/08	BR	Continue drafting motion for summary judgment.	0.8	360.00
04/03/08	BR	Review emails from Keith re administrative record.	0.4	180.00

RIMAC & MARTIN, P.C.

August 15, 2008

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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
04/03/08	BR	Continue drafting motion for summary judgment.	1.8	810.00
04/04/08	BR	Research re Illston decision, discretion and scope of review.	2.9	1,305.00
04/04/08	BR	Prepare motion for summary judgment re scope.	2.5	1,125.00
04/04/08	BR	Review email from Hugo.	0.2	90.00
04/07/08	BR	Serve initial documents on defendant's counsel.	0.3	135.00
04/07/08	BR	Continue drafting motion for summary judgment.	2.5	1,125.00
04/08/08	BR	Continue drafting motion for summary judgment.	2.1	945.00
04/09/08	BR	Continue drafting motion for summary judgment.	3.2	1,440.00
04/10/08	BR	Continue drafting motion for summary judgment.	0.7	315.00
04/11/08	BR	Continue drafting motion for summary judgment.	0.9	405.00
04/14/08	BR	Research re de novo standard.	0.6	270.00
04/14/08	BR	Prepare insert re de novo standard.	1.2	540.00
04/14/08	BR	Draft section re plan provisions.	2.3	1,035.00
04/16/08	BR	Finish drafting section of motion for summary judgment re plan terms.	1.5	675.00
04/21/08	BR	Review and revise motion for summary judgment.	2.5	1,125.00

RIMAC & MARTIN, P.C.

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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
04/23/08	BR	Review defendant's 12(b)(6)/motion for summary judgment motion and exhibits.	3.8	1,710.00
04/23/08	BR	Review cases cited therein.	1.8	810.00
04/23/08	BR	Telephone conference with Keith re 12(b)(6) motion for summary judgment motion.	0.3	135.00
04/24/08	BR	Review defendant's supplemental filing re exhibits.	0.4	180.00
04/24/08	BR	Review plan re arguments made in defendant's motion for summary judgment.	0.5	225.00
04/28/08	BR	Begin review of documents forwarded by Hugo and translation.	1.3	585.00
04/29/08	BR	Continue review of translated documents.	1.3	585.00
04/29/08	BR	Review email from Keith re Landers.	0.4	180.00
04/29/08	BR	Review email from Hugo re Landers.	0.3	135.00
05/01/08	BR	Telephone conference and emails with Keith and Hugo re documents, ADR, case management conference and motion for summary judgment.	1.5	675.00
05/01/08	BR	Begin review of additional documents.	1.0	450.00
05/02/08	BR	Continue review of		

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DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		documents and translating.	1.8	810.00
05/06/08	BR	Review email from Hugo re motion for summary judgment motions.	0.1	45.00
05/06/08	BR	Prepare email to Keith re motion for summary judgment motions.	0.1	45.00
05/07/08	BR	Telephone conference and email with Keith re motion for summary judgment, documents and call with Hugo.	0.3	135.00
05/07/08	BR	Prepare email to Hugo motion for summary judgment and documents.	0.1	45.00
05/07/08	BR	Research re ADR and translation.	0.5	225.00
05/08/08	BR	Review email from Hugo re conference call and Jack Landers.	0.3	135.00
05/08/08	BR	Prepare for and participate in conference call with Hugo and Keith.	1.0	450.00
05/08/08	BR	Prepare email to Keith re plan administrator.	0.3	135.00
05/08/08	BR	Prepare ADR certification and forward to Hugo.	0.3	135.00
05/09/08	BR	Review email from Hugo re ADR, documents and Jack Landers.	0.3	135.00
05/09/08	BR	Review email from defendant re meet and confer and case management conference and prepare reply.	0.3	135.00

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August 15, 2008

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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
05/09/08	BR	Prepare case management conference statement.	1.2	540.00
05/12/08	BR	Review email from Keith re translation.	0.3	135.00
05/12/08	BR	Research re translation.	0.4	180.00
05/12/08	BR	Review email from Hugo re Kanter documents.	1.0	450.00
05/12/08	BR	Review emails from plaintiff re case management conference and meet and confer.	0.2	90.00
05/13/08	BR	Review email re translation.	0.2	90.00
05/14/08	BR	Review email from defendant re case management conference, meet and confer.	0.3	135.00
05/14/08	BR	Prepare email re translation.	0.2	90.00
05/15/08	BR	Meet and confer with defendant's counsel re ADR and case management conference.	1.3	585.00
05/15/08	BR	Continue preparing case management conference statement.	0.5	225.00
05/15/08	BR	Prepare ADR stipulation.	0.4	180.00
05/15/08	BR	Review email from defendant's counsel re ADR stipulation.	0.4	180.00
05/15/08	BR	Review email from Keith re stock and meet and confer and prepare response.	0.4	180.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
05/16/08	BR	Prepare ADR certification and stipulation for service and filing.	0.3	135.00
05/16/08	BR	Review defendant's ADR certification.	0.1	45.00
05/16/08	BR	Prepare email to Keith re documents.	0.3	135.00
05/19/08	BR	Review email from Hugo re documents.	0.1	45.00
05/19/08	BR	Review email from Keith re documents and Landers.	0.2	90.00
05/20/08	BR	Review email from Hugo and job re documents.	0.3	135.00
05/20/08	BR	Review email from Keith re job, Landers and declaration.	0.6	270.00
05/20/08	BR	Prepare Landers declaration.	1.0	450.00
05/20/08	BR	Review and revise motion for summary judgment.	2.5	1,125.00
05/20/08	BR	Review email from Hugo re medical benefit issues.	0.5	225.00
05/21/08	BR	Review emails from Hugo re medical benefits.	0.3	135.00
05/21/08	BR	Review and revise Landers declaration.	0.2	90.00
05/21/08	BR	Review email from Keith re Landers' declaration.	0.1	45.00
05/21/08	BR	Review order of court re mediation.	0.1	45.00
05/22/08	BR	Review administrative record and add documents.	2.8	1,260.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
05/22/08	BR	Prepare email to Keith re administrative record and Landers declaration.	0.3	135.00
05/22/08	BR	Prepare email to Hugo re administrative record and Landers declaration.	0.3	135.00
05/22/08	BR	Review and revise Landers declaration.	0.3	135.00
05/22/08	BR	Review and revise motion for summary judgment.	1.8	810.00
05/23/08	BR	Telephone conference with Keith re case management conference, mediation, Rule 26, motion for summary judgment and administrative record.	0.6	270.00
05/23/08	BR	Prepare email to Keith re case management conference, mediation, Rule 26, motion for summary judgment and administrative record.	0.2	90.00
05/23/08	BR	Review emails and documents from Hugo re plan.	0.4	180.00
05/23/08	BR	Review and revise motion for summary judgment.	1.2	540.00
05/23/08	BR	Review emails re Job.	0.1	45.00
05/27/08	BR	Review and revise motion for summary judgment and administrative record.	3.8	1,710.00
05/27/08	BR	Review emails from Hugo and Job re motion for summary judgment and administrative record.	0.4	180.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
 INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
05/28/08	BR	Review email from Hugo re lapse in salary.	0.3	135.00
05/28/08	BR	Prepare section of motion for summary judgment re claim.	2.5	1,125.00
05/28/08	BR	Begin review of official translations.	0.6	270.00
05/28/08	BR	Finish drafting joint case management conference statement.	0.6	270.00
05/28/08	BR	Review email from plaintiff re joint case management conference statement.	0.3	135.00
05/28/08	BR	Prepare initial disclosure.	1.0	450.00
05/28/08	BR	Telephone conference and email with Keith re case management conference, disclosure and damages.	0.4	180.00
05/29/08	BR	Review email from defendant re case management conference and disclosure.	0.3	135.00
05/29/08	BR	Review and revise case management conference and disclosure.	0.3	135.00
05/29/08	BR	Prepare case management conference statement and disclosure for service and filing.	0.4	180.00
05/29/08	BR	Review email from Hugo re lapse and prepare reply.	0.2	90.00
06/02/08	BR	Begin drafting Hugo's declaration.	0.5	225.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
06/02/08	BR	Review email from Keith re Landers and discuss with him re same.	0.5	225.00
06/02/08	BR	Continue drafting claim section of motion for summary judgment.	2.5	1,125.00
06/02/08	BR	Complete review of official translated pleadings.	1.8	810.00
06/03/08	BR	Review defendant's initial disclosures.	0.2	90.00
06/03/08	BR	Review email from Keith re exit letter exhibit and prepare response.	0.3	135.00
06/03/08	BR	Prepare email to Hugo re additional documents.	0.2	90.00
06/03/08	BR	Finish drafting motion for summary judgment.	3.8	1,710.00
06/03/08	BR	Continue drafting Hugo's declaration.	0.5	225.00
06/03/08	BR	Review Landers' deposition notices.	0.2	90.00
06/04/08	BR	Review email from Hugo re documents.	0.1	45.00
06/04/08	BR	Review email form Keith re case management conference and deposition.	0.3	135.00
06/05/08	BR	Review email.	0.2	90.00
06/05/08	BR	Review and revise motion for summary judgment.	2.5	1,125.00
06/06/08	BR	Telephone conference and emails with Keith re case management conference,		

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
 INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		motion for summary judgement and opposition.	0.3	135.00
06/06/08	BR	Prepare email to Hugo and Job re declarations.	0.2	90.00
06/06/08	BR	Review and revise motion for summary judgment.	2.0	900.00
06/06/08	BR	Prepare for and attend case management conference.	1.5	675.00
06/09/08	BR	Finish drafting Job's declaration.	1.0	450.00
06/09/08	BR	Review email from Job re his declaration and prepare response.	0.3	135.00
06/09/08	BR	Review email from Hugo re his declaration and prepare response.	0.2	90.00
06/09/08	BR	Review and revise motion for summary judgment points and authorities.	2.1	945.00
06/10/08	BR	Research re award for stock options under ERISA.	0.5	225.00
06/10/08	BR	Review email from Job re his declaration and prepare response.	0.9	405.00
06/10/08	BR	Telephone conference and email with Keith re Job declaration.	0.5	225.00
06/10/08	BR	Review and revise Job's declaration.	0.5	225.00
06/10/08	BR	Prepare Hugo's declaration.	2.5	1,125.00
06/10/08	BR	Telephone conference and		

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		email with Keith re Hugo's declaration.	0.3	135.00
06/10/08	BR	Review and revise points and authorities.	0.6	270.00
06/10/08	BR	Begin drafting notice.	0.3	135.00
06/10/08	BR	Prepare documents re options.	0.2	90.00
06/10/08	BR	Begin review of defendant's motion for summary judgment.	0.3	135.00
06/10/08	BR	Review email to Hugo re declaration and prepare response.	0.2	90.00
06/10/08	BR	Review court order re case management conference.	0.1	45.00
06/10/08	BR	Begin drafting declaration of William Reilly.	0.3	135.00
06/10/08	BR	Review and revise point and authorities.	1.8	810.00
06/11/08	BR	Telephone conference and emails with Keith re declarations.	0.4	180.00
06/11/08	BR	Finish review of defendant's motion for summary judgment for declaration.	0.5	225.00
06/11/08	BR	Prepare email to Job re his declaration.	0.5	225.00
06/11/08	BR	Prepare email to Hugo re his declaration.	0.3	135.00
06/11/08	BR	Review and revise		

RIMAC & MARTIN, P.C.

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HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		declarations.	1.0	450.00
06/11/08	BR	Telephone conference re translation review and translator's CV.	0.3	135.00
06/11/08	BR	Prepare documents and exhibits for declarations.	1.5	675.00
06/11/08	BR	Continue drafting Reilly declaration.	0.3	135.00
06/11/08	KG	Analyze draft of motion for summary judgment and principal cases.	2.1	840.00
06/11/08	KG	Revise motion for summary judgment, analyze draft and principal cases, plot out reorganization, prepare editor's notes for modification and clarification.	3.8	1,520.00
06/11/08	KG	Legal research - standard of review where claims decisions does not comply with plan imposed requirements.	0.7	280.00
06/11/08	KG	Legal research - standard for determining bad faith in the claims denial.	0.8	320.00
06/12/08	BR	Telephone conference and emails from Keith re motion for summary judgment, documents and declarations.	0.6	270.00
06/12/08	BR	Review email from Job re his declaration and prepare response.	0.4	180.00
06/12/08	BR	Review and revise Job declaration.	0.3	135.00

RIMAC & MARTIN, P.C.

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HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
06/12/08	BR	Review email from Hugo re his declaration and prepare response.	0.7	315.00
06/12/08	BR	Review and revise Hugo declaration.	0.8	360.00
06/12/08	BR	Review and revise points and authorities.	3.9	1,755.00
06/12/08	BR	Prepare section of points and authorites re benefits, fines and removal of admin.	3.5	1,575.00
06/12/08	BR	Finish drafting notice.	0.6	270.00
06/12/08	BR	Finish drafting Reilly declaration.	0.5	225.00
06/12/08	KG	Review edits made to introduction, statement of facts and legal standards in PNAs supporting motion for summary judgment and revise, mark up for spelling and punctuation, continue reorganizing and streamlining.	2.5	1,000.00
06/12/08	KG	Revise argument subsection A; legal research re standards for offensive collateral estoppel.	2.9	1,160.00
06/12/08	KG	Legal research on issue of comity given to foreign court decisions.	1.2	480.00
06/13/08	BR	Review email from Job re his declaration and prepare response.	0.2	90.00
06/13/08	BR	Prepare Job declaration		

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		and exhibits for service and filing.	0.7	315.00
06/13/08	BR	Review email from Hugo re his declaration and prepare response.	0.3	135.00
06/13/08	BR	Prepare Hugo declaration for service and filing.	0.6	270.00
06/13/08	BR	Telephone conference and email with defendant re page limits.	0.3	135.00
06/13/08	BR	Prepare motion to extend page limit.	0.6	270.00
06/13/08	BR	Prepare motion to extend page limit for service and filing.	0.2	90.00
06/13/08	BR	Review and revise notice.	0.5	225.00
06/13/08	BR	Review and revise Reilly declaration.	0.4	180.00
06/13/08	BR	Prepare Reilly declaration and exhibits and notice for service and filing.	0.6	270.00
06/13/08	BR	Review and revise points and authorities.	2.8	1,260.00
06/13/08	BR	Prepare points and authorities for service and filing.	0.3	135.00
06/13/08	BR	Prepare request for judicial notice and prepare for service and filing.	0.8	360.00
06/13/08	BR	Prepare disclosure of documents and production for service.	0.4	180.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
06/13/08	KG	Revise, refine and shorten introduction and statement of facts.	0.4	160.00
06/13/08	KG	Revise, reorganize and rewrite section A arguing for de novo review.	1.8	720.00
06/13/08	KG	Revise, shorten and clarify argument for section B re the scope of documents to include in the review.	1.5	600.00
06/13/08	KG	Revise, shorten and clarify argument for section C as to why the claim should be approved.	1.1	440.00
06/13/08	KG	Revise, shorten and clarify argument for section D as to the lack of evidence supporting the claims decision.	0.8	320.00
06/13/08	KG	Revise, shorten and clarify argument for section E as to why the Dutch Court's decision should be given collateral estoppel effect.	0.7	280.00
06/13/08	KG	Review and revise section F as to why the claims decision was self-serving.	0.6	240.00
06/13/08	KG	Review and shorten argument as to why Mr. Sluimer is entitled to plan benefits (section G).	0.6	240.00
06/13/08	KG	Review and revise argument in favor of statutory damages.	0.3	120.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
06/13/08	KG	Prepare conclusion.	0.2	80.00
06/13/08	KG	Review and revise notice of motion.	0.4	160.00
06/16/08	BR	Prepare and file revised Hugo declaration.	0.5	225.00
06/16/08	BR	Telephone conference with Keith re Hugo declaration.	0.2	90.00
06/16/08	BR	Prepare email to Hugo re motion for summary judgment filing.	0.1	45.00
06/17/08	BR	Review email from defendant's counsel re hearing and depositions.	0.3	135.00
06/17/08	BR	Telephone conference and email with Keith re hearing, depositions and motion for summary judgment opposition.	0.4	180.00
06/17/08	BR	Research re CFR and claims procedure and fiduciary.	2.3	1,035.00
06/17/08	BR	Review order re ADR conference.	0.2	90.00
06/17/08	BR	Review email from Hugo re motion for summary judgment.	0.1	45.00
06/18/08	BR	Research re regulations and claims handling.	1.9	855.00
06/19/08	BR	Prepare for Landers deposition.	0.8	360.00
06/19/08	BR	Review defendant's notice re Lander's deposition.	0.1	45.00
06/19/08	BR	Review order granting		

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		extension of page limits.	0.1	45.00
06/19/08	BR	Review emails from Keith re Job and Hugo.	0.3	135.00
06/20/08	BR	Telephone conference and emails with Keith re opposition.	0.4	180.00
06/20/08	BR	Review and revise motion for summary judgment opposition.	1.9	855.00
06/20/08	BR	Review emails from Hugo and Job re documents.	0.3	135.00
06/20/08	BR	Review USSC case.	1.0	450.00
06/23/08	BR	Prepare for and attend Landers deposition.	2.5	1,125.00
06/23/08	BR	Review email from Keith and prepare response re Job declaration and meet with Keith re opposition.	0.4	180.00
06/23/08	BR	Review Landers rough ASCII transcript.	0.4	180.00
06/23/08	BR	Review email from Job re his declaration.	0.2	90.00
06/23/08	BR	Review and revise motion for summary judgment opposition.	0.8	360.00
06/24/08	BR	Research re regulations and their application.	2.4	1,080.00
06/24/08	BR	Review email from Keith re opposition and his declaration and prepare response.	0.3	135.00
06/24/08	BR	Review and revise Keith's declaration.	0.2	90.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
06/24/08	BR	Review email from Job re his declaration.	0.2	90.00
06/24/08	BR	Prepare sections of opposition re ERISA.	1.4	630.00
06/25/08	BR	Prepare for and attend ADR conference.	0.5	225.00
06/25/08	BR	Telephone conference with plaintiff re ADR conference.	0.1	45.00
06/25/08	BR	Review order re ADR conference.	0.1	45.00
06/25/08	BR	Telephone conference and emails with Keith re his declaration and opposition.	0.3	135.00
06/25/08	BR	Prepare section re Contra perferendum and contract cases.	2.5	1,125.00
06/25/08	BR	Review and revise opposition.	0.5	225.00
06/25/08	KG	Review new Supreme Court case which confirms that the defendants suffer from a per se conflict of interest.	0.4	160.00
06/25/08	KG	Analysis of opposition.	0.2	80.00
06/26/08	BR	Review and revise motion.	0.7	315.00
06/26/08	BR	Prepare declaration and exhibits for filing.	0.5	225.00
06/26/08	BR	Telephone conference with Keith re declaration and exhibits for filing.	0.3	135.00
06/26/08	KG	Review and revise		

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		opposition to defendant's motion for summary judgment.	2.8	1,120.00
06/27/08	BR	Review defendant's opposition to motion for summary judgment.	2.0	900.00
06/27/08	KG	Review and revise opposition to motion for summary judgment.	0.9	360.00
06/30/08	BR	Review email from Keith re Job declaration.	0.1	45.00
07/01/08	BR	Prepare reply.	1.0	450.00
07/02/08	BR	Continue preparation of reply.	7.8	3,510.00
07/02/08	BR	Research cases cited in opposition, lapse and receipt.	1.0	450.00
07/02/08	KG	Legal research - cases and secondary sources cited by the defendants as to collateral estoppel.	0.7	280.00
07/02/08	KG	Prepare reply showing why comity requires giving preclusive effect to the Dutch court's decision.	1.6	640.00
07/02/08	KG	Prepare outline and introduction of reply.	0.9	360.00
07/02/08	KG	Prepare brief argument referring to the Supreme Court's recent Glenn decision.	1.6	640.00
07/02/08	KG	Review and revise portion of brief on Kanter's admission he is not plan administrator.	1.8	720.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
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Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
07/02/08	KG	Prepare response to Kantor's claim he was not self interested and adequately investigated the claim.	0.8	320.00
07/03/08	BR	Prepare section of reply re penalties and non-ERISA cites.	2.0	900.00
07/03/08	BR	Review and revise reply.	2.3	1,035.00
07/03/08	BR	Prepare objections and response to defendant's objections.	1.0	450.00
07/03/08	BR	Prepare reply for service and filing.	0.3	135.00
07/03/08	KG	Review and revise reply section on waiver.	0.6	240.00
07/03/08	KG	Review and revise reply section on scope of review.	0.5	200.00
07/03/08	KG	Review and revise reply subsections on notice.	1.1	440.00
07/03/08	KG	Review and revise reply subarguments on failure to execute release.	0.6	240.00
07/03/08	KG	Review and revise reply section on conflict of interest.	1.3	520.00
07/03/08	KG	Analyze defendants' opposition to confirm points needed for reply.	0.7	280.00
07/05/08	BR	Prepare objection to defendant's evidence.	0.5	225.00
07/14/08	BR	Continue drafting objection to defendant's		

RIMAC & MARTIN, P.C.

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HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
		evidence.	2.1	945.00
07/14/08	BR	Prepare response to objection to Reilly declaration and VanderPijl declaration.	1.5	675.00
07/16/08	BR	Prepare objections to Kanter declaration and DeRoos declaration.	2.5	1,125.00
07/16/08	BR	Research re SEC sites in request for judicial notice.	0.8	360.00
07/16/08	BR	Finish drafting response to objection to Reilly declaration and Vander Pijl declaration.	1.8	810.00
07/16/08	BR	Prepare response to objection for service and filing.	0.3	135.00
07/16/08	KG	Revise response to objection to Reilly declaration.	0.8	320.00
07/16/08	KG	Revise response to objection to Pijl declaration.	0.1	40.00
07/17/08	BR	Review and revise Kanter objection, judicial notice and response to defendant's judicial notice and objection.	2.0	900.00
07/17/08	BR	Prepare Hussain objection.	1.3	585.00
07/17/08	BR	Research re Verity Board.	0.4	180.00
07/17/08	BR	Prepare documents for service and filing.	0.4	180.00
07/17/08	BR	Prepare for hearing.	3.0	1,350.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
07/17/08	KG	Prepare response to objection to plaintiff's request for judicial notice.	0.5	200.00
07/17/08	KG	Legal research re propriety and extent of judicial notice of prior court orders in same dispute.	0.4	160.00
07/17/08	KG	Prepare objection to defendants' request for judicial notice.	0.2	80.00
07/18/08	BR	Review email from Hugo re hearing.	0.1	45.00
07/18/08	BR	Prepare for and attend hearing.	3.5	1,575.00
07/18/08	BR	Telephone conference with Keith re hearing.	0.3	135.00
07/21/08	BR	Review emails from Keith and Hugo re options and fees motion.	0.4	180.00
07/22/08	BR	Review and analysis of summary judgment order.	1.0	450.00
07/23/08	BR	Telephone conference and emails with Keith re ruling.	0.4	180.00
07/23/08	BR	Prepare fees motion.	1.0	450.00
07/24/08	BR	Review email from Hugo and Keith re judgment.	0.2	90.00
07/25/08	BR	Review email from Keith re fees and costs.	0.3	135.00
07/29/08	BR	Continue preparation of fees motion.	1.2	540.00

RIMAC & MARTIN, P.C.

August 15, 2008

HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	ATTY	SERVICES RENDERED	HOURS	AMOUNT
07/29/08	BR	Review email from plaintiff re fees motion and local rules.	0.4	180.00
07/29/08	BR	Review Minute order.	0.1	45.00
07/30/08	BR	Review emails re fees motion.	0.4	180.00
07/30/08	BR	Research re local rules re clarification and fees.	0.5	225.00
07/30/08	BR	Prepare motion and stipulation.	1.5	675.00
07/30/08	KG	Analysis of motion for clarification on issues of statutory penalties.	0.3	120.00
07/31/08	BR	Finish preparing motion for clarification and joint stipulation.	0.5	225.00
07/31/08	BR	Review emails from defendant's counsel re joint stipulation.	0.5	225.00
07/31/08	BR	Prepare joint stipulation for service and filing.	0.3	135.00
07/31/08	KG	Revise joint motion for clarification.	0.8	320.00
07/31/08	KG	Review status of case and strategy for attorney fees motion with Bill.	0.2	80.00
TOTAL CURRENT PROFESSIONAL FEES 07/31/08			327.9	\$145,445.00

SUMMARY	HOURS	RATE	AMOUNT
William Reilly	285.70	450.00	128,565.00
Kevin Gill	42.20	400.00	16,880.00

RIMAC & MARTIN, P.C.

August 15, 2008

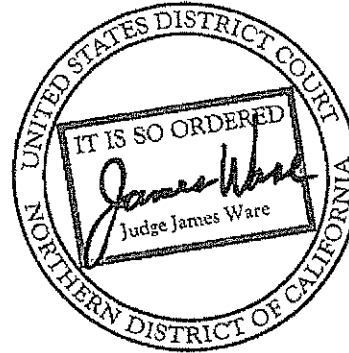
HUGO SLUIMER, HUGO

OUR FILE NUMBER 90-1
INVOICE NUMBER 6108

Name of matter: SLUIMER V VERITY

DATE	COSTS ADVANCED	AMOUNT
02/28/08	Fees paid to Clerk, USDC Northern District re filing of complaint.	350.00
02/29/08	Fees paid to Nationwide Legal re file summons and complaint.	68.00
03/12/08	Fees paid to Nationwide Legal Service re multiple personal serves of summons and complaint to Verity Inc. and Verity Change Control Benefits Plan.	338.00
05/29/08	Fees paid to Nationwide re delivery to chambers of Judge Isltoany at USDC.	9.00
05/31/08	Copy Fees.	64.10
06/17/08	Fees paid to Nationwide Legal re delivery to chambers, Judge Illston.	35.00
06/30/08	Fees paid to Nationwide Legal re delivery and filing with Clerk, USDC.	35.00
TOTAL CURRENT COSTS ADVANCED 07/31/08		\$899.10
TOTAL CURRENT FEES AND COSTS 07/31/08		\$146,344.10
TOTAL BALANCE DUE 07/31/08		\$146,344.10

EXHIBIT B



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ERIK UDD, individually and on behalf of a
class of all other persons similarly situated,

Plaintiff,

vs.

ALAN B. VIDINSKY, DONALD C.
LIGHTBODY, ALAN B. VIDINSKY &
JOANNE K. VIDINSKY 1993 TRUST and
VALIN CORPORATION AMENDED
EMPLOYEE STOCK OWNERSHIP PLAN
AND TRUST COMMITTEE,

Defendants.

Case No. CV 04-05080 JW

James Ware
~~[REVISED PROPOSED]~~ ORDER
GRANTING MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AND AWARD OF
ATTORNEYS' FEES

This matter is before the Court on the motion of Plaintiff Erik Udd for final approval of the class action settlement reached in this action, award of attorneys' fees and costs, and award of service payment to the class representative.

The Court, having entered an Order on March 13, 2006, preliminarily approving the Settlement Agreement (a copy of which is attached as Exhibit A to the Order of March 13, 2006, granting preliminary approval) and conditionally certifying the following class:

All Plan participants or beneficiaries whose Company Stock
Accounts in the Plan were credited with additional shares of Valin
Corporation common stock as a result of the July 12, 2001
transaction. Excluded from the class are Defendants Vidinsky and

1 Lightbody;

2 having directed that Notice be given to all Class Members of the proposed settlement and of a
3 hearing (the "Fairness Hearing") scheduled to determine whether the proposed settlement should
4 be finally approved as fair, adequate, and reasonable, and to hear any objections to any of these
5 matters; having considered Plaintiff's motion for final approval of the Settlement Agreement and
6 documents in support thereof; having considered the Settlement Agreement and all exhibits
7 attached thereto; and having considered all of the submissions and arguments with regard to
8 Plaintiff's motion for final approval; and having held the Fairness Hearing and considered the
9 submissions and arguments made in connection therewith;

10 **THE COURT HEREBY FINDS AS FOLLOWS:**

11 1. To the extent defined in the Agreement attached hereto as Exhibit A and
12 incorporated herein by reference, the terms in this Order shall have the meanings set forth therein
13 or in the Order of March 13, 2006, preliminarily approving the Settlement.

14 2. The Court has subject matter jurisdiction over this action and personal jurisdiction
15 over the parties.

16 3. Without affecting the finality of this Order and Judgment, the Court retains
17 jurisdiction over the interpretation, administration, and consummation of the Settlement
18 Agreement.

19 4. Notice to the Class Members has been given in an adequate and sufficient manner,
20 and the notice given constitutes the best notice practicable, complying in all respects with federal
21 law and the requirements of due process. Notice given to Class Members was reasonably
22 calculated under the circumstances to apprise Class Members of the pendency of this action, of
23 all material elements of the proposed Settlement, and of their opportunity to object to or
24 comment on the Settlement and to appear at the Fairness Hearing. Full opportunity has been
25 afforded to Class Members to participate in the Fairness Hearing. Accordingly, the Court finds
26 that all Class Members are bound by this Order.

27 5. The Order of March 13, 2006, of this Court certifying the class defined above
28 pursuant to Fed. R. Civ. P. Rule 23(a) and 23(b)(1) and (b)(2) is confirmed.

1 6. Because the Court certified the settlement class under Rule 23(b)(1) and (b)(2),
2 class members may not opt out of the mandatory Class.

3 7. The Court set a deadline of May 18, 2006, for Class Members to file objections to
4 the Settlement. No objections have been filed. The Court has held a hearing to consider the
5 fairness, reasonableness, and adequacy of the proposed settlement.

6 8. The Settlement Agreement was made in good faith. Arm's length negotiations
7 took place between Class Counsel and defense counsel, under the supervision of the mediator,
8 Judge (Ret.) Charles Renfrew, that resulted in the proposed Settlement.

9 9. The proposed Settlement – being in all respects fair, reasonable, adequate, proper,
10 and in the best interests of the Class Members given the benefits of settlement and the risks,
11 complexity, expenses, and probable duration of further litigation between Class Members and
12 Defendants – is accordingly finally approved.

13 10. In accordance with the terms of the Settlement Agreement, which are hereby
14 incorporated by reference as though fully set forth herein, it is hereby ordered, adjudged, and
15 decreed as follows: Defendants are ordered to distribute Settlement Amounts to Class Members
16 (or their Plan accounts, as appropriate), within 60 days of the Effective Date, or as soon as
17 administratively practicable, but in no event later than 90 days after the Effective Date, in
18 accordance with the Settlement Agreement Section II.B.2.f. Defendants are discharged and
19 released from the Released Claims as defined in Paragraphs II.B.1.i and II.A.5 of the Agreement
20 and the Unknown Claims as defined in Paragraph II.A.8, and those claims are hereby dismissed
21 with prejudice. Nothing in this Order shall be construed to affect any claims not released under
22 the terms of the Settlement Agreement, including but not limited to the pending shareholder
23 derivative action *Shea v. Vidinsky, Lightbody, Sycamore Lake Partners, LLC, and Does 1-100,*
24 *inclusive and Valin Corp.*, Case No. CGC 04-437473, in California Superior Court in San
25 Francisco.

26 11. Also in accordance with the terms of the Settlement Agreement, Plaintiff and the
27 Class Members, and their fiduciaries, trustees, heirs, executors, administrators, beneficiaries,
28 representatives, predecessors, agents, attorneys, successors and assigns, are barred and enjoined

1 from instituting, maintaining, prosecuting or enforcing, in any capacity, the Released Claims
2 against the Released Persons, except to the extent that this Court retains jurisdiction to enforce
3 the Settlement and effectuate the terms of the Settlement.

4 12. Nothing in the Settlement or this Order is or shall be deemed an admission by
5 Defendants of any liability or wrongdoing.

6 13. The Court has examined Plaintiff's request for award of attorney's fees, costs, and
7 class representative payment. The Court finds that Class Counsel has devoted substantial time to
8 this litigation for the benefit of the Class, represented the Class on a contingent fee basis, and
9 obtained an excellent result for the Class. The Court further finds that Plaintiff's requested
10 award of \$202,622.45 for lodestar attorneys' fees and costs is reasonable in light of the factors
11 listed above and of the fact that the fees requested represent only approximately six (6) percent of
12 the monetary value of the Settlement, which is substantially less than the 25 percent
13 "benchmark" in the Ninth Circuit. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d
14 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Altson & Hunt v. Gaulty*, 886 F.2d 268 (9th Cir.
15 1989); *Torrisi v. Tucson Electric Power Co.*, 8 F. 3d 1370, 1376-77 (9th Cir. 1993).

16 14. The Court further finds that the hourly rates requested – \$495 per hour for Daniel
17 Feinberg, \$295 per hour for Margaret Hasselman and Claire Kennedy-Wilkins, and \$180 per
18 hour for Michelle Roberts before she was sworn in as an attorney and for law clerk and paralegal
19 time – are reasonable and in line with those prevailing in the community for similar services of
20 lawyers of reasonably comparable skill, experience, and reputation.

21 15. The Court further finds that Plaintiff's request for award of costs for out-of-pocket
22 expenses incurred by Class Counsel in the litigation is reasonable. The Court finds that the costs
23 requested to be reimbursed were reasonably incurred for the benefit of the Class.

24 16. Therefore, in accordance with the terms of the Settlement, the Vidinsky
25 Defendants are ordered to pay to Class Counsel within fourteen (14) calendar days \$202,622.45
26 for attorneys' fees and costs.

27 17. The Court further finds that the Class Representative played a significant role in
28 developing the factual background for this litigation and in settlement negotiations. Plaintiff's

1 requested service payment of \$4,000 for the Class Representative is modest in comparison to
2 service payments awarded to class representatives in other cases, and is reasonable in light of the
3 Class Representative's contributions to the litigation. Therefore Plaintiff's request for a \$4,000
4 service payment to Class Representative Erik Udd by the Vidinsky Defendants is approved.

5 **IT IS SO ORDERED.**

6
7 Dated: June 26, 2006

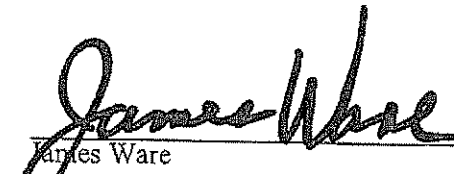
8 
9 James Ware
United States District Court Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ILENE P. KING,
Plaintiff,
v.
CIGNA CORPORATION, et al.,
Defendants.

No. C 06-7025 CW
ORDER GRANTING
PLAINTIFF'S MOTION
FOR RECOVERY OF
ATTORNEYS' FEES

Plaintiff Ilene P. King moves to recover attorneys' fees incurred in prosecuting this action. Defendants Connecticut General Life Insurance Company and Alltel Telephone Services Long Term Disability Plan oppose Plaintiff's motion.¹ The matter was taken under submission on the papers. After considering all of the papers filed by the parties, the Court grants Plaintiff's motion, but awards her less than the total amount of fees sought.

BACKGROUND

Plaintiff brought this action under the Employee Retirement Income Security Act (ERISA) challenging Defendants' denial of her long-term disability benefits. In an order dated August 7, 2007,

¹In this order, all references to "Defendants" apply to these two Defendants only.

1 the Court granted judgment in favor of Plaintiff on her claim for
2 benefits. However, it denied Plaintiff's claims for breach of
3 fiduciary duty and statutory penalties. It also dismissed all
4 claims against CIGNA Corporation, which is neither Plaintiff's
5 disability plan nor her plan's sponsor, fiduciary, or
6 administrator.

7 Plaintiff now seeks recovery of attorneys' fees in the amount
8 of \$106,071.25 against Defendants. In support of this request,
9 Plaintiff submits the declaration of her attorney, Julian M. Baum,
10 detailing the hours he and other attorneys spent on the case, and
11 providing information to support Plaintiff's contention that these
12 attorneys' hourly rates are reasonable.

13 DISCUSSION

14 I. Timeliness of Plaintiff's Motion

15 As a threshold matter, Defendants argue that Plaintiff's
16 motion should be denied because it was filed untimely. Pursuant to
17 Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure, a motion
18 for attorneys' fees must be filed "no later than 14 days after
19 entry of judgment," unless otherwise provided by statute or court
20 order. Judgment in this case was entered on August 24, 2007, and
21 directed Plaintiff to file her motion for attorneys' fees within
22 fourteen days, corresponding to a deadline of Friday, September 7,
23 2007. Plaintiff filed her motion on that date, but did not file
24 the accompanying Baum declaration until the next court day,
25 September 10, 2007. Plaintiff attributes the delay to difficulties
26 using the court's electronic filing system.

27 Defendants are correct in noting that the declaration should
28

1 have been filed with Plaintiff's motion on September 7, 2007.
2 Nevertheless, Plaintiff's motion was filed by the deadline, and
3 Defendants have not shown that they were prejudiced by the delay of
4 one court day in filing the supporting declaration. Accordingly,
5 the delay provides no basis for denying Plaintiff's motion.

6 II. Plaintiff's Request for Attorneys' Fees

7 ERISA provides that "the court in its discretion may allow a
8 reasonable attorney's fee and costs of action to either party." 29
9 U.S.C. § 1132(g)(1). The Ninth Circuit has held that "[t]his
10 section should be read broadly to mean that a plan participant or
11 beneficiary, if he prevails in his suit under § 1132 to enforce his
12 rights under his plan, should ordinarily recover an attorney's fee
13 unless special circumstances would render such an award unjust."
14 Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984)
15 (internal quotation marks omitted). This is in line with ERISA's
16 broad remedial purpose "to protect employee rights and to secure
17 effective access to federal courts." Id.

18 In determining whether special circumstances exist warranting
19 the denial of attorneys' fees, a court may consider: (1) the degree
20 of the opposing party's culpability or bad faith; (2) the ability
21 of the opposing party to satisfy an award of fees; (3) whether an
22 award of fees against the opposing party would deter others from
23 acting in similar circumstances; (4) whether the party requesting
24 fees sought to benefit all participants and beneficiaries of an
25 ERISA plan or to resolve a significant legal question regarding
26 ERISA; and (5) the relative merits of the parties' positions.
27 Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).

1 No one of these Hummell factors is decisive, and some may not be
2 pertinent in a given case. Carpenters S. Cal. Admin. Corp. v.
3 Russell, 726 F.2d 1410, 1416 (9th Cir. 1984). Rather, they reflect
4 a balancing, and not all must weigh in favor of a fee award.
5 McElwaine v. U.S. West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999).

6 A consideration of the Hummell factors in this case reveals a
7 lack of special circumstances to warrant denying Plaintiff's
8 motion. While the Court has not found that Defendants acted in bad
9 faith, bad faith is not required for an award of attorneys' fees.
10 Smith, 746 F.2d at 590. And from a legal perspective, Defendants
11 are "culpable" in that they were found to owe Plaintiff a legal
12 duty that they were not fulfilling.

13 It is not disputed that Defendants have the ability to pay the
14 fees sought. In addition, even though this lawsuit seeks primarily
15 to benefit Plaintiff, an award of attorneys' fees could serve to
16 deter other plan administrators from denying meritorious disability
17 claims. This could indirectly benefit other individuals.

18 As for the relative merits of the parties' positions,
19 Plaintiff succeeded on her claim for benefits. While it is true
20 that her claims for breach of fiduciary duty and statutory
21 penalties were dismissed along with her claims against CIGNA, this
22 does not constitute a basis for denying her motion. Smith held
23 that attorneys' fees should not be denied "simply because the
24 plaintiff failed to prevail on every contention raised in the
25 lawsuit. Litigants in good faith may raise alternative legal
26 grounds for a desired outcome, and the court's rejection of or
27 failure to reach certain grounds is not a sufficient reason for
28

1 reducing a fee. The result is what matters." 746 F.2d at 591
2 (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)).

3 Accordingly, the fifth Hummell factor also supports awarding
4 Plaintiff attorneys' fees.

5 III. Amount of Recoverable Fees

6 In the Ninth Circuit, reasonable attorneys' fees are
7 determined by first calculating the "lodestar." Jordan v.
8 Multnomah County, 815 F.2d 1258, 1262 (9th Cir. 1987). "The
9 'lodestar' is calculated by multiplying the number of hours the
10 prevailing party reasonably expended on the litigation by a
11 reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d
12 359, 363 (9th Cir. 1996). There is a strong presumption that the
13 lodestar figure represents a reasonable fee. Jordan, 815 F.2d at
14 1262. However, the court may adjust the award from the lodestar
15 figure upon consideration of additional factors that may bear upon
16 reasonableness. Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70
17 (9th Cir. 1975).

18 Determining a reasonable hourly rate is a critical inquiry.
19 Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465 U.S. 886, 895
20 n.11 (1984)). In establishing the reasonable hourly rate, the
21 court may take into account: (1) the novelty and complexity of the
22 issues; (2) the special skill and experience of counsel; (3) the
23 quality of representation; and (4) the results obtained. See
24 Cabrales v. County of Los Angeles, 864 F.2d 1454, 1464 (9th Cir.
25 1988). These factors are subsumed in the initial lodestar
26 calculation, and should not serve as independent bases for
27 adjusting fee awards. Morales, 96 F.3d at 363-64. The reasonable
28

1 rate inquiry should also be informed by reference to the prevailing
2 market rates in the forum district. Gates v. Deukmejian, 987 F.2d
3 1392, 1405 (9th Cir. 1992).

4 The Supreme Court has recognized that, while it is appropriate
5 for the district court to exercise its discretion in determining an
6 award of attorneys' fees, it remains important for the court to
7 provide "a concise but clear explanation of its reasons for the fee
8 award." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hall v.
9 Bolger, 768 F.2d 1148, 1151 (9th Cir. 1985) (in computing an award,
10 the district court should provide a "detailed account of how it
11 arrives at appropriate figures for 'the number of hours reasonably
12 expended' and 'a reasonable hourly rate'" (quoting Blum, 465 U.S.
13 at 898).

14 A. Hourly Rate

15 Plaintiff's seeks an hourly rate of \$450 for Mr. Baum, the
16 lead attorney on her case, \$425 for Robert C. Weems, his partner,
17 and \$400 for Thomas J. Fuchs, an associated attorney. Defendants
18 do not argue that Mr. Baum's or Mr. Weems' rates are unreasonable,
19 but they do argue that there is insufficient evidence to justify
20 Mr. Fuchs' rate.

21 Mr. Baum's declaration details the three attorneys'
22 professional backgrounds. According to the declaration, Mr. Baum
23 has practiced law for approximately twenty years, working on a
24 variety of complex cases. He also has significant experience
25 litigating ERISA actions. His 2007 billing rate for ERISA matters
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27
28

1 is \$450 per hour.² Mr. Weems graduated from law school in 1990 and
2 also has extensive experience litigating complex lawsuits,
3 including lawsuits involving disputes between policyholders and
4 insurers. His 2007 billing rate for ERISA matters is \$425 per
5 hour. Mr. Fuchs graduated from law school in 1987 and served for
6 seventeen years as a law clerk in the United States Bankruptcy
7 Court. Additionally, he has a doctorate in clinical psychology.
8 His 2007 billing rate for ERISA matters is \$400 per hour.

9 Mr. Baum states in his declaration that he is familiar with
10 the prevailing market rates for experienced ERISA attorneys in the
11 Bay Area, and that the above rates are typical of the market. This
12 accords with rates found reasonable in other cases. For instance,
13 in a 2006 case, this Court found that Mr. Baum's and Mr. Weems'
14 hourly rates of \$415 and \$400, respectively, were reasonable.
15 Order Denying Plaintiff's Application for an Order to Show Cause
16 and Granting Motion for Award of Attorneys' Fees, dated June 30,
17 2006, King v. GE Fin. Assurance Co., No. C 05-3478. Mr. Baum
18 states that his firm's rates have increased since the King case.
19 In other ERISA cases, courts have found similar rates to be
20 reasonable for attorneys with an amount of experience roughly
21 equivalent to Mr. Baum's and Mr. Weems'. See Farhat v. Hartford
22 Life and Accident Ins. Co., 2006 WL 2521571, at *7 (N.D. Cal.)

23
24
25 ²Some of the work billed by Mr. Baum's law firm was performed
26 in 2006. However, the Ninth Circuit has held that when an
27 attorney's payment is delayed, the district court may compensate by
28 applying the attorney's current rate to all hours billed. Fischel
v. Equitable Life Assurance Society of the U.S., 307 F.3d 997, 1010
(9th Cir. 2002). Thus, the Court uses the attorneys' 2007 rates
for all applicable calculations in this case.

1 (finding the rate of \$435 reasonable for a law firm partner with
2 significant ERISA experience and noting that "[t]he declarations
3 and relevant case law establish a range for experienced partners
4 from approximately \$400/hour to \$495/hour"); May v. Metropolitan
5 Life Ins., 2005 WL 839291, at *3 (N.D. Cal.) (noting evidence that
6 the prevailing rate for partner-level ERISA attorneys in the Bay
7 Area is between \$425 and \$450 per hour); Fenberg v. Cowden, 2006 WL
8 83053, at *3-*4 (N.D. Cal.) (approving a rate of \$400 per hour for
9 an ERISA attorney who lived outside the Bay Area and had
10 "significantly less" than twenty years of ERISA litigation
11 experience). Given Mr. Baum's and Mr. Weems' level of experience,
12 their rates appear to be within the prevailing rate range.
13 Considering also that Defendants do not assert that these
14 attorneys' rates are unreasonable or provide any evidence
15 demonstrating as much, the Court finds the rates to be reasonable.

16 Defendants correctly note that there is less evidence
17 supporting the reasonableness of Dr. Fuchs' rate of \$400 per hour.
18 Mr. Baum's declaration states that Dr. Fuchs has twenty years of
19 legal experience and possesses a doctorate in clinical psychology,
20 but says nothing of his expertise in ERISA matters or in mediation,
21 for which his services in this case were primarily used. However,
22 Plaintiff has provided information about the prevailing rates of
23 other attorneys in the community, albeit attorneys with somewhat
24 different professional backgrounds. "[T]he Ninth Circuit has
25 implied that defendants cannot simply disagree with this evidence,
26 but should 'support their arguments with any affidavits or evidence
27 of their own regarding legal rates in the community.'" Farhat,

1 2006 WL 2521571 at *7 (quoting United Steelworkers of Am. v. Phelps
2 Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990)). Given the
3 evidence presented, the Court concludes that Dr. Fuchs' hourly rate
4 of \$400 is reasonable.

5 B. Number of Hours

6 Defendants argue that Plaintiff's attorneys' fees should be
7 reduced by \$18,036.25 because an excessive number of hours were
8 billed. Specifically, Defendants assert that: 1) the time spent
9 researching discovery issues was unjustified; 2) they should not be
10 held responsible for the time spent researching the issues
11 underlying CIGNA's request for a voluntary dismissal; 3) Mr. Baum's
12 review in preparation for the case management conference was
13 redundant and unnecessary; 4) research related to Dr. Gerstenblitt
14 was excessive and unnecessary; 5) Plaintiff cannot recover charges
15 for the services of Mr. Baum's paralegal; and 6) it was
16 unreasonable for two attorneys to attend the mediation on
17 Plaintiff's behalf.

18 The Court has reviewed the itemized charges submitted in
19 connection with Plaintiff's motion, and concludes that the number
20 of hours charged is reasonable except as noted below. A reduction
21 of \$5,956.25 from the amount of fees sought is appropriate, leading
22 to a total award of \$100,565, including \$450 for Mr. Baum's time
23 spent preparing Plaintiff's reply on this motion.³ This amount is
24

25 ³In her reply, Plaintiff seeks \$1,350 for the three hours Mr.
26 Baum spent drafting it. Because this request is not supported by a
27 declaration, the Court will award Plaintiff only \$450 for the time
28 spent preparing the reply, representing one hour's worth of Mr.
Baum's fees.

1 also consistent with awards of attorneys' fees in other ERISA
2 cases. See Baum Dec. Ex. C.

3 1. Research on discovery issues

4 Mr. Baum billed Plaintiff for 12.7 hours of legal research and
5 analysis concerning discovery issues. Defendants argue that
6 because no discovery was involved in this case, these charges are
7 unreasonable.

8 Plaintiff notes that on February 28, 2007, Mr. Baum spent 5.3
9 hours researching cases construing the Ninth Circuit's decision in
10 Abatie v. Alta Health & Life Insurance Co., 458 F.3d 955 (9th Cir.
11 2006), which changed the law on the standard of review in ERISA
12 cases. Abatie's holdings also impacted the right of ERISA
13 plaintiffs to obtain discovery. See Shemano-Krupp v. Mutual of
14 Omaha Ins. Co., 2006 WL 3365595, at *9 (N.D. Cal.); Toven v. Metro.
15 Life Ins. Co., 2007 WL 2713579, at *1 (C.D. Cal.). Given that
16 Abatie was decided only recently, it was not unreasonable for Mr.
17 Baum to spend 5.3 hours researching the case's effect on subsequent
18 law, even considering his expertise on ERISA matters. Nor was it
19 unreasonable for him to spend 3.1 hours analyzing these issues on
20 February 23, 2007 in preparation for the Court's case management
21 conference.

22 Mr. Baum also spent 4.3 hours on April 13, 2007 researching
23 other cases in which CIGNA had been required to produce discovery.
24 Because this research pertained solely to CIGNA, which was
25 dismissed from the action, Defendants should not be required to pay
26 for it. Accordingly, these 4.3 hours are deducted from the
27 allowable time billed, and Plaintiff's award is reduced by \$1,935.

2. Research on claims against CIGNA

Defendants object to paying for charges incurred in connection with the 6.7 hours Mr. Baum spent on March 15, 2007 researching the legal issues underlying CIGNA's request that Plaintiff voluntarily dismiss it from the action. As noted above, the Court granted CIGNA's motion for judgment, finding that because CIGNA did not issue Plaintiff's policy, administer Plaintiff's claim or participate in the denial of Plaintiff's benefits, it could not be held liable under ERISA. It would be unfair to charge Defendants for Plaintiff's research on CIGNA's liability, in that the subject matter of the research did not concern them, but rather another party that ultimately prevailed. Accordingly, Plaintiff's request for fees is further reduced by \$3,015, corresponding to 6.7 hours of Mr. Baum's time.

3. Preparation for the case management conference

Defendants object to the two hours of time Mr. Baum spent reviewing the case file in preparation for the Court's case management conference. They assert that because Mr. Weems, not Mr. Baum, attended the conference, Mr. Baum's work was redundant and unnecessary. Mr. Baum represents that, after reviewing the file, he created a memo that Mr. Weems read before reviewing the file himself. The Court is not persuaded that this charge is unreasonable, and will allow Plaintiff to recover it.

4. Research on Dr. Gerstenblitt

Mr. Baum spent 8.5 hours searching medical databases and case law for information about the credentials, reputation and experience of Dr. Gerstenblitt, the physician on whose report

Defendants relied in denying Plaintiff's claim. Defendants object to the charge for this research, arguing that Plaintiff never sought to introduce extrinsic evidence about Dr. Gerstenblitt. This may be true, but the fact that Plaintiff was not able to uncover evidence raising serious doubts about Dr. Gerstenblitt's abilities does not mean that the search for such evidence was unreasonable. Defendants relied heavily on Dr. Gerstenblitt's report in their decision to deny Plaintiff's benefits. Plaintiff was entitled to look into his professional background, and 8.5 hours is not an unreasonable amount of time to spend looking.

5. Paralegal charges

Defendants also object to Mr. Baum's charge for 8.05 hours of paralegal services at an hourly rate of \$125. In supporting the reasonableness of this charge, Plaintiff correctly points out that paralegal fees may be included in an award of attorneys' fees. However, the Ninth Circuit has held that:

If the attorney's hourly rate already incorporates the cost of work performed by non-attorneys, then courts should not compensate for these costs as an additional reasonable attorney's fee. The key . . . is the billing custom in the relevant market. Thus, fees for work performed by non-attorneys such as paralegals may be billed separately, at market rates, if this is the prevailing practice in a given community. Indeed, even purely clerical or secretarial work is compensable if it is customary to bill such work separately, though such tasks should not be billed at the paralegal rate, regardless of who performs them. . . . [T]he district court may properly insist that the [moving party] show that it is the custom in the relevant community to bill separately for work performed by the non-attorneys at issue

Trustees of Constr. Indus. and Laborers Health and Welfare Trust v. Redland, 460 F.3d 1253, 1257 (9th Cir. 2006) (internal quotation

1 marks and citations omitted).

2 Plaintiff has provided no evidence of the prevailing practice
3 in the Bay Area legal community with respect to billing clients for
4 paralegal services, nor has she provided information demonstrating
5 that an hourly rate of \$105 for paralegal services is reasonable.
6 Even if she had, she still would not be able to recover this rate
7 for purely clerical services performed by the paralegal. At least
8 one charge seems to be based on no more than copying legal
9 authorities for review by attorneys. Baum Dec. Ex. A at 7. For
10 these reasons, the Court denies Plaintiff's request to recover fees
11 for paralegal services, and her award is reduced by \$1,006.25.

12 6. Mediation charges

13 At the Court-ordered mediation in this case, Plaintiff was
14 represented by two attorneys: Mr. Baum and Dr. Fuchs. Defendants
15 argue that it was unreasonable for Plaintiff to send two attorneys
16 to the mediation, because Mr. Baum is highly skilled in ERISA
17 matters and should have been able to handle Plaintiff's
18 representation himself. However, "the participation of more than
19 one attorney [at a mediation] does not necessarily constitute an
20 unnecessary duplication of effort." Mardirossian v. Guardian Life
21 Ins. Co. of Am., 457 F. Supp. 2d 1038, 1049-50 (C.D. Cal. 2006)
22 (quoting Kim v. Fujikawa, 871 F.2d 1427, 1435 n.9 (9th Cir. 1989));
23 see also Fleming v. Kemper Nat'l Servs., Inc., 373 F. Supp. 2d
24 1000, 1009 (N.D. Cal. 2005); Lopez v. S.F. Unified School Dist.,
25 385 F. Supp. 2d 981, 993-94 (N.D. Cal. 2005).

26 The mediation in this case represented a significant
27 opportunity to resolve the dispute at an early stage, and it was
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1 not unreasonable for Plaintiff to enlist the services of two
2 attorneys with different backgrounds and perspectives to attend it.
3 Accordingly, the Court finds that Dr. Fuchs' fees are recoverable.

4 CONCLUSION

5 For the foregoing reasons, the Court GRANTS Plaintiff's motion
6 for attorneys' fees and awards her \$100,565, to be paid forthwith,
7 jointly and severally by Defendants.

8 IT IS SO ORDERED.

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10 Dated: 12/13/07

Claudia Wilken

11 CLAUDIA WILKEN
12 United States District Judge
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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CYNTHIA FLEMING,

No. C-03-5135 MMC

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES,
COSTS, AND PREJUDGMENT
INTEREST; VACATING HEARING**

v.

KEMPER NATIONAL SERVICES, INC., et
al.,

(Docket No. 73)

Defendants.

Before the Court is plaintiff Cynthia Fleming's ("Fleming") motion, filed April 25, 2005, for attorneys' fees, costs, and prejudgment interest. Defendants Kemper National Services, Inc.; Vodafone Americas, Inc. Short Term Disability Plan; and Vodafone Americas, Inc. Long Term Disability Plan have filed timely opposition to the motion, to which Fleming has replied. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, see Civil L.R. 7-1(b), and hereby VACATES the June 10, 2005 hearing on the motion. For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

BACKGROUND

In this ERISA action, the Court granted judgment for Fleming on April 11, 2005. On

1 April 25, 2005, Fleming timely filed the instant motion for attorneys' fees, costs, and
2 prejudgment interest. Fleming seeks an award of attorneys' fees in the amount of
3 \$102,862.50, plus \$2363.87 in costs, and prejudgment interest in the amount of \$4885.03.

4 DISCUSSION

5 A. Attorneys' Fees and Costs

6 In an ERISA action to recover unpaid disability benefits, "the court in its discretion
7 may allow a reasonable attorney's fee and costs of action to either party." See 29 U.S.C.
8 § 1132(g)(1). The Ninth Circuit has held that "[t]his section should be read broadly to mean
9 that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his
10 rights under his plan, should ordinarily recover an attorney's fee unless special
11 circumstances would render such an award unjust." See Smith v. CMTA-IAM Pension
12 Trust, 746 F.2d 587, 589 (9th Cir. 1984) (internal quotations omitted). "As a general rule,
13 ERISA employee plaintiffs should be entitled to a reasonable attorney's fee 'if they succeed
14 on any significant issue in litigation which achieves some of the benefit the parties sought in
15 bringing suit.'" Id. at 589 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

16 In determining whether to award fees and costs, the Court should consider the
17 following factors, often referred to as the "Hummell factors":

18 (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the
19 opposing parties to satisfy an award of fees; (3) whether an award of fees against
20 the opposing parties would deter others from acting in similar circumstances; (4)
21 whether the parties requesting fees sought to benefit all participants and
22 beneficiaries of an ERISA plan or to resolve a significant legal question regarding
23 ERISA; and (5) the relative merits of the parties' positions.

24 See id. at 590 (quoting Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1982)).

25 "No one of the Hummell factors, however, is necessarily decisive, and some may not be
26 pertinent in a given case." Id. (citation omitted). Because an employee's resources are
27 generally limited, however, and ERISA is intended to afford plan participants effective
28 access to the courts, the ability of the defendant to satisfy an award of fees is a key factor.
See id. at 589-90. "Based on this factor alone, absent special circumstances, a prevailing
ERISA employee plaintiff should ordinarily receive attorney's fees from the defendant."

1 See id. at 590.

2 **1. The Hummell factors**

3 **a. The degree of defendants' culpability or bad faith**

4 The Court turns first to the degree of the instant defendants' culpability or bad faith.
5 See Hummell, 634 F.2d at 453. "Although bad faith is a factor that would always justify an
6 award, it is not required." See Smith v. CMTA-IAM Pension Trust, 746 F.2d at 590. Here,
7 there is no indication that defendants acted in bad faith by denying plaintiff's claim.
8 Nonetheless, defendants are culpable to the extent they refused to complete their review of
9 plaintiff's appeal of the denial of plaintiff's claim, even after plaintiff brought the failure to
10 their attention by filing suit, as well as their focusing "overly on Fleming's physical
11 limitations" rather than on "the effects of Fleming's pain and her pain medications on her
12 ability to successfully function as a financial analyst." (See Order Granting Judgment For
13 Plaintiff After Bench Trial, filed April 11, 2005, at 26.) This factor thus supports, albeit only
14 slightly, an award of fees and costs.

15 **b. The ability of defendants to satisfy an award of fees**

16 The second Hummell factor is the ability of defendants to satisfy an award of fees.
17 See Hummell, 634 F.2d at 453. Defendants concede, in their opposition, that "there is no
18 current issue concerning the ability to pay fees." (See Opp. at 3.) Consequently, this factor
19 supports an award of fees and costs.

20 **c. Whether an award of fees against defendants would deter others**
21 **from acting in similar circumstances**

22 The third Hummell factor is whether an award of fees against defendants would
23 deter others from acting in similar circumstances. See Hummell, 634 F.2d at 453. The
24 Court finds an award of attorneys' fees against defendants would enhance the likelihood
25 that other ERISA plans that become aware of this lawsuit would take steps to ensure that
26 administrative review is completed in a timely manner, and that the effect of the insured's
27 pain is taken into account in determining whether the insured is entitled to disability
28 benefits. See, e.g., Carpenters Southern California Administration Corp. v. Russell, 726

1 F.2d 1410 (9th Cir. 1984) ("If defendant employers face the prospect of paying attorney's
2 fees for successful plaintiffs, they will have added incentive to comply with ERISA.");
3 McElwaine v. US West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999) ("A fee award would
4 deter other employers from forcing beneficiaries to undertake costly litigation to preserve
5 their claims.") Indeed, plaintiff's counsel attests that at the American Bar Association's
6 Section of Labor & Employment Law Benefits Committee Midwinter Meeting in February
7 2005, she received a printed handout, entitled "Go ahead, shoot yourself in the other foot
8 (10 quick ways to lose in 2005)," which cites the instant case as an example of how not to
9 handle an ERISA action. (See Springer-Sullivan Decl. ¶ 24 and Ex. 8.) This factor
10 supports an award of fees and costs.

11 **d. Whether the party requesting fees sought to benefit all participants**
12 **and beneficiaries of an ERISA plan or to resolve a significant legal question**
13 **regarding ERISA**

14 The fourth Hummell factor is whether the party requesting an award of fees sought,
15 by filing suit, to benefit all participants and beneficiaries of an ERISA plan or to resolve a
16 significant legal question regarding ERISA. See Hummell, 634 F.2d at 453. In the instant
17 case, plaintiff sought only to obtain benefits for herself. Indeed, as defendant correctly
18 points out, plaintiff expressly stated, in the joint pretrial statement filed December 27, 2004,
19 that "[t]he fourth Hummell factor is not applicable to Ms. Fleming's claim because it was a
20 claim for individual benefits." (See Joint Pretrial Statement at 24.) Thus, this factor does
21 not support an award of fees and costs. See Oster v. Barco of California Employees'
22 Retirement Plan, 869 F.2d 1215, 1222 (9th Cir. 1989) (finding fourth Hummell factor
23 weighed against awarding fees where plaintiff sought "benefit for himself, regardless of the
24 impact such a payment might have on the future beneficiaries of the Plan").

25 **e. The relative merits of the parties' positions**

26 "The fifth Hummell factor, the relative merits of the parties' positions, is, in the final
27 analysis, the result obtained by the plaintiff." Smith, 746 F.2d at 590. In the instant case,
28 the Court found Fleming was entitled to the disability benefits she sought in her complaint.

1 This factor supports an award of fees and costs.

2 Accordingly, as all but one of the Hummell factors weigh in favor of an award of fees
3 and costs to Fleming, and no special circumstances suggest such an award would be
4 unjust, the Court finds Fleming is entitled to an award of fees and costs.

5 **2. Amount of Costs**

6 Fleming has filed a separate bill of costs in the amount of \$2077.59, pursuant to 28
7 U.S.C. § 1920 and Civil L.R. 54-1 et seq., which is pending before the Clerk. (See Docket
8 No. 71.) By the instant motion, Fleming seeks an award of costs under § 1132(g) in the
9 amount of \$2363.87, but only “to the extent they are not awarded as taxable costs pursuant
10 to 28 U.S.C. § 1920.” (See Motion at 12; Reply at 14.) Defendants have not opposed
11 Fleming’s request for costs pursuant to § 1132(g).¹

12 Accordingly, Fleming’s request for an award of costs under § 1132(g) will be
13 GRANTED in the amount of \$286.28, the amount of costs sought in excess of that sought
14 in her bill of costs. The Court expresses no opinion as to whether Fleming is entitled to all
15 of the costs itemized in her bill of costs, as that matter is currently pending before the Clerk.

16 **3. Amount of Attorney’s Fees**

17 In determining the amount of attorney’s fees to be awarded under § 1132(g), the
18 Ninth Circuit has held that the district court first “must determine a ‘lodestar’ amount by
19 multiplying the number of hours reasonably expended on the litigation by a reasonable
20 hourly rate.” See D’Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1383 (9th
21 Cir. 1990). The district court then may increase or decrease the lodestar fee based on
22 certain factors that are not subsumed within the initial calculation of the lodestar. See id.
23 “Such upward or downward adjustments are the exception rather than the rule since the
24 lodestar amount is presumed to constitute a reasonable fee.” Id. In the instant case,
25 Fleming does not seek an adjustment of the lodestar amount.

26 In determining the lodestar figure, the district court should exclude hours that were
27

28 ¹ Defendants have filed objections to Fleming’s separate bill of costs, however.

1 not reasonably expended. See id. at 1384. Once the number of hours is set, the district
2 court must “determine a reasonable hourly rate considering the experience, skill, and
3 reputation of the attorney requesting fees.” See id. (citation omitted). The determination of
4 the reasonable fee “is not made by reference to rates actually charged,” but by reference to
5 “the prevailing market rate in the community for similar services of lawyers of reasonably
6 comparable skill, experience and reputation.” See id. (internal quotation and citation
7 omitted).

8 **1. Number of Hours**

9 Fleming seeks attorney’s fees for 388.65 hours of attorney time and 10.95 hours of
10 law clerk² time expended on the litigation from November 19, 2003 through April 22, 2005,
11 plus an additional 29.15 hours of attorney time and 10.20 hours of law clerk time incurred
12 from April 25, 2005 through May 19, 2005 in preparing the motion for fees, for a total of
13 417.8 hours of attorney time and 21.15 hours of law clerk time.³ (See Springer-Sullivan
14 Decl. ¶ 18 and Ex.1; see also Springer-Sullivan Second Decl. ¶ 7 and Ex. 3.) Defendants
15 challenge the reasonableness of the number of hours spent by plaintiffs in litigating the
16 action, as set forth below.

17 **a. Motion for Summary Judgment on Standard of Review**

18 First, defendants argue that fees for all but 10 hours of the 79.8 hours Fleming’s
19 counsel spent preparing her motion for summary judgment on the standard of review
20 should be disallowed because much of the briefing addressed an issue the Court did not
21 decide. In her motion for summary judgment on the standard of review, Fleming set forth
22 several arguments as to why de novo review should be applied; the Court agreed with one
23 of the arguments, granted Fleming’s motion, and did not reach Fleming’s additional
24 argument that statements by the California Department of Insurance that discretionary
25

26 ² Each of the three law clerks who worked on the case was a law student at the time.
27 (See Springer-Sullivan Decl. ¶ 14.)

28 ³ Fees incurred in preparing a motion for fees are compensable under ERISA. See
D’Emanuele, 904 F.2d at 1387.

1 clauses in disability insurance contracts violate California law ("CDI issue") also required
2 the Court to apply de novo review. The Court finds Fleming reasonably set forth multiple
3 arguments in support of her motion. The Court's decision not to address all of those
4 arguments in its order does not provide a basis for denying an award of the fees incurred in
5 addressing an argument the Court did not reach. As the Supreme Court observed in
6 Hensley v. Eckerhart, 461 U.S. 424 (1983), "Litigants in good faith may raise alternative
7 legal grounds for a desired outcome, and the court's rejection of or failure to reach certain
8 grounds is not a sufficient reason for reducing a fee. The result is what matters." See
9 Hensley v. Eckerhart, 461 U.S. at 435; see also Smith v. CMTA-IAM Pension Trust, 746
10 F.2d at 589 (citing Hensley).

11 Defendants further argue that Fleming's briefing on the CDI issue essentially
12 duplicated briefing previously submitted by her counsel's law firm in a previous case. The
13 Court agrees that some of the briefing on the CDI issue largely duplicates briefing
14 previously submitted in Rowe v. Planetout Partners Inc. Long Term Disability Plan, C-03-
15 1145 WHA. Fleming's billing records indicate that only 5.85 hours of attorney time was
16 billed specifically for work on the CDI issue, however. (See Springer-Sullivan Decl. Ex. 2 at
17 4-5.) Moreover, the 33.1 hours spent drafting the motion, although not allocated among the
18 issues addressed therein, does not appear unreasonable. Accordingly, the Court finds the
19 time spent on the summary judgment motion to be reasonable.

20 **b. Review of Complaint**

21 Defendants next argue that Fleming unreasonably seeks fees for 2.85 hours of law
22 clerk time spent reviewing the complaint on November 19, 2003. Defendants argue that
23 because Fleming's counsel had already spent almost four hours preparing the complaint, it
24 is unreasonable for a law clerk to have spent three more hours reviewing the complaint.
25 Fleming responds, in her opposition, that the law clerk was verifying the accuracy of the
26 allegations, and that it was both efficient and necessary for the law clerk do so. The Court
27 finds the challenged time was reasonably spent.

28 **c. Preparation of Joint Case Management Statement**

Defendants challenge as excessive the 7.85 hours Fleming's counsel spent preparing the joint case management statement. As defendants correctly note, the joint case management statement is five pages in length, and contains no legal argument. (See Penrose Decl. Ex. I.) Fleming points out, however, that defendants themselves billed 4.2 hours reviewing the joint case management statement, and argue that because Fleming took on the burden of drafting the statement, she reasonably spent more time on the statement than did defendant's counsel. Although work on the case management conference statement may reflect "behind the scenes" disputes that do not appear in the final product, neither party has adequately explained how counsel spent a combined total of more than 12 hours preparing the relatively straightforward case management statement. Given the absence of an explanation, the Court finds the 7.85 hours billed by plaintiff on this matter to be excessive, and finds that no more than 5 hours of time reasonably could have been spent preparing the case management statement.

Accordingly, the Court will award fees for only 5 hours of the 7.85 hours Fleming's counsel spent preparing the joint case management statement.

d. Preparation of Initial Disclosures

Defendants contend that Fleming unreasonably spent 7.55 hours preparing her initial disclosures, and request that the Court award fees for only three hours. Defendants argue that the initial disclosures contain only a list of names that already appeared in the administrative record and a simple damages calculation. Fleming responds that the time was spent in a diligent effort to comply with the requirements of Rule 26(a)(1). In light of the large number of witnesses disclosed in the initial disclosures, (see Springer-Sullivan Second Decl. Ex. 1), the Court finds Fleming's counsel reasonably spent 7.55 hours preparing those disclosures.

e. Settlement Conference

Defendants argue that Fleming unreasonably spent 49.70 hours preparing for and attending the settlement conference in the instant action, because defendants spent only 21.8 hours on the same tasks. The issue is whether the amount of time spent by Fleming

1 was reasonable, however, not whether defendants managed to prepare for the same
2 conference in fewer hours. The discrepancy on which defendants rely does not suffice to
3 support a finding that Fleming overprepared for the conference, any more than a
4 conclusion that defendants underprepared. Defendants also argue that because Fleming
5 had already prepared an extensive letter setting forth the grounds for her administrative
6 appeal, (see Penrose Decl. Ex. G), and a letter setting forth a settlement proposal, it is
7 unclear how Fleming could spend so much additional time preparing for the settlement
8 conference. The settlement letter, however, was prepared after, not before, the settlement
9 conference statement. Further, although the work spent on the administrative appeal likely
10 was helpful to Fleming's counsel in preparing for the settlement conference, the Court
11 cannot say it was unreasonable for counsel to spend additional time familiarizing
12 themselves with the nuances of the case in preparation for the give-and-take of the
13 settlement conference.

14 Defendants further argue that it was unreasonable for Fleming to send two attorneys
15 to the conference. The settlement conference had the potential for being the most
16 significant court date in the case, however, and it was not unreasonable for Fleming to
17 send two counsel to attend it. As plaintiffs point out, given the importance of the
18 conference, it was necessary for a senior attorney to attend, and it also was important that
19 the more junior attorney who actually drafted the settlement conference statement be
20 available at the conference to answer questions about the facts of the case and the
21 supporting evidence. Although the senior attorney could have drafted the statement
22 himself, it would have not been cost-effective, as his billing rate is more than twice as high
23 as that of the more junior attorney who actually drafted the statement.

24 Accordingly, the Court finds the amount of time spent by Fleming's counsel in
25 preparing for and attending the settlement conference to be reasonable.

26 //

27 f. Pretrial Conference

28 Defendants similarly object to Fleming's sending two attorneys to the pretrial

1 conference, and request that the Court disallow half of the six hours counsel spent in
2 preparing for and attending the pretrial conference. The pretrial conference is one of the
3 definitive proceedings in the litigation, however, and, consequently, it was not unreasonable
4 for Fleming to have sent two attorneys to the conference to address any issues raised by
5 the Court. The Court finds the six hours spent by counsel in preparing for and attending
6 the pretrial conference to be reasonable.

7 **g. Fees Motion**

8 Finally, defendants contend Fleming's counsel unreasonably spent 12.9 hours of
9 attorney time preparing the motion for fees and 3.65 hours of law clerk time researching the
10 requirements for the bill of costs.

11 With respect to the time spent preparing the motion, defendants argue that the fees
12 motion is "nothing more than a 'cut and paste'" from the discussion of fees in the Joint
13 Pretrial Statement. Fleming responds that her fifteen-page motion was not "cut-and-
14 pasted" from the "one-page attorneys' fees section of the Joint Pre-Trial Statement." (See
15 Reply at 10.) Although Fleming's discussion of attorneys' fees in the Joint Pretrial
16 Statement was actually close to four pages in length, (see Penrose Decl. Ex. H at 22-25),
17 the Court agrees with Fleming that much of the fees motion was drafted from scratch. The
18 Court further finds that 12.9 hours was not an unreasonable amount of time to spend in
19 preparing this fifteen-page motion.

20 With respect to the bill of costs, defendants argue that fees for no more than an hour
21 of time should be allowed for researching the requirements for bills of costs, since the Civil
22 Local Rules expressly set forth what costs are allowable. Defendants also argue that any
23 attorney should already know the rules for bills of costs. The Court agrees that 3.65 hours
24 of law clerk time spent researching the rules for bills of costs is excessive. In the Court's
25 order granting judgment for Fleming, the Court expressly ordered that "Fleming's requests
26 for costs and attorney's fees shall be filed in conformity with Civil Local Rules 54-1 and
27 54.6, respectively." (See Order Granting Judgment for Plaintiff After Bench Trial, filed April
28 11, 2005, at 33.) The Civil Local Rules, beginning at Rule 54-1, expressly state the

requirements for bills of costs. (See Civil L.R. 54-1 et seq.) As the Court directed Fleming to the requirements for bills of costs, the Court agrees with defendants that no more than 1.5 hours of law clerk time reasonably should have been spent on the issue.

Accordingly, the Court finds that Fleming reasonably spent 12.9 hours in attorney time preparing her motion for fees, but reasonably spent only 1.5 hours of law clerk time, rather than the 3.65 hours actually billed, researching the requirements for bills of costs.

h. Conclusion as to Number of Hours Reasonably Spent

As noted, Fleming seeks fees for 417.8 hours of attorney time and 21.15 hours of law clerk time. For the reasons set forth above, the Court finds that 414.95 hours of attorney time and 19 hours of law clerk time were reasonably expended in litigating the instant action and in preparing the motion for fees and bill of costs.

2. Hourly Rates

Four attorneys and three law clerks worked on the instant case on Fleming's behalf, with the majority of the work being performed by attorney Cassie Springer-Sullivan ("Springer-Sullivan"). (See Springer-Sullivan Decl. Ex. 1.) Attorneys Daniel Feinberg, Thuy Le ("Le"), and Vincent Cheng ("Cheng") also billed work on the case. (See *id.*) Fleming seeks an award of fees at the following hourly rates:

Springer-Sullivan	\$225
Feinberg	\$450
Le	\$200
Cheng	\$200
Law clerks	\$125

(See Springer-Sullivan Decl. Ex. 1.)

Defendants argue that all attorneys' fees should be awarded at an hourly rate of \$200, and that fees for law clerk time should be awarded at an hourly rate of \$80. Defendants rely on several opinions issued by a judge in this district, in non-ERISA cases, in which that judge held a reasonable fee is the fee that would be billed by "reasonably competent counsel," and that if "a party chooses to employ counsel of unusual skill and experience, the court awards only the fee necessary to secure reasonably competent counsel." See, e.g., *Albion Pacific Property Resources v. Seligman*, 329 F. Supp. 2d 1163,

1 1167-68 (N.D. Cal. 2004). The judge further held that “[a] reasonable hourly rate is based
2 on rates charged in the local legal community as a whole, not particular segments of the
3 bar” and that “the average market rate in the local legal community as a whole is a better
4 approximation of the hourly rate that would be charged by reasonably competent counsel
5 than the actual billing rate charged by a single attorney.” See id. at 1169, 1170. After
6 devising a formula derived from information obtained from the United States Census
7 Bureau and Bureau of Labor Statistics, the judge calculated that as of April 2005,
8 reasonably competent counsel in the San Francisco area, regardless of their practice area,
9 would charge \$200 per hour, see Baerthlein v. Electronic Data Systems Corp., 2005 WL
10 818381 at *5 (N.D. Cal. April 7, 2005), and that as of July 2004, a reasonable hourly rate
11 for legal assistant work is \$70, see Albion, 329 F. Supp. 2d at 1178.⁴

12 As none of the cited cases in which the above-referenced methodology was
13 employed is an ERISA case, the cases are distinguishable on that ground alone.
14 Moreover, as noted, the Ninth Circuit has held that, in awarding attorneys’ fees in an ERISA
15 case, district courts must consider “the experience, skill, and reputation of the attorney
16 requesting fees” and “should use the prevailing market rate in the community for similar
17 services of lawyers of reasonably comparable skill, experience, and reputation.” See
18 D’Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d at 1384 (internal quotation and
19 citation omitted). The cases relied upon by defendants do not take into account the
20 lawyers’ skill, experience, and reputation in setting a reasonable fee. See, e.g., Albion, 329
21 F. Supp. 2d at 1129. Accordingly, the Court finds Albion and its progeny distinguishable
22 and declines to follow their methodology in awarding fees in the instant ERISA action.

23 Defendants present no other argument for reducing the hourly rates of Fleming’s
24 attorneys and law clerks. Fleming has set forth in detail the professional background of
25 each of her attorneys. (See Springer-Sullivan Decl. ¶¶ 3-13.) Springer-Sullivan is a third-
26 year associate who practices almost exclusively in the area of ERISA litigation and a

27
28 ⁴ Defendants ask that the Court award fees at an hourly rate of \$80 for law clerks, an increase of \$10 an hour from the rate found appropriate in Albion.

published author on ERISA issues. (See id. ¶¶ 5, 7.) Feinberg is a partner with more than ten years of experience in ERISA issues. (See id. ¶¶ 8-11.) Le and Cheng are second- and first-year associates, respectively. (See id. ¶¶ 12-13.) Fleming submits the declaration of R. Bradford Huss ("Huss"), a shareholder in the San Francisco law firm of Trucker Huss, a "21-attorney firm [that] practices exclusively in the fields of ERISA, qualified and non-qualified retirement plans, employee benefits and related litigation." (See Springer Sullivan Decl. Ex. 11 (Huss Decl.) ¶ 2.) Huss attests that he has been practicing in the area of ERISA litigation since 1977 and that his rate of \$425-450 per hour, and his firm's rate of \$200 to \$225 per hour for a second-year ERISA associate, is "about 20% lower than the rates charged by large San Francisco firms for attorneys with similar qualifications and experience." (See id. ¶ 6.) Fleming also submits declarations from Steven M. Tindall ("Tindall"), a partner at Lieff, Cabraser, Heimann & Bernstein LLP who litigates class actions involving ERISA, product defects, and employment issues. (See Tindall Decl. ¶ 2.) Tindall graduated from law school in 1996 and attests that his billing rate is \$375 per hour, and that his firm's hourly billing rate for second- and third-year associates is \$285 per hour. (See id. ¶ 3.) Ronald Dean, an attorney whose primary practice has involved ERISA for the past 28 years, attests that his billing rate from January 2003 to January 2005 was \$475 per hour. (See Dean Decl. ¶ 4.) Dean further attests that he believes the hourly rates sought by Feinberg, Springer-Sullivan, Le, Cheng, and their law clerks "are reasonable and reflect the market value for their time." (See id. ¶ 12.) Fleming also points out that a judge in this district recently awarded fees in an ERISA case based on declarations that the market rate for partner-level ERISA attorneys in the Bay Area is \$425-\$450 per hour, and approximately \$225 per hour for ERISA associates. See May v. Metropolitan Life Ins. Co., 2005 WL 839291 at *3-4 (N.D. Cal. April 7, 2005). As defendants have submitted no evidence to the contrary, the Court finds the hourly rates sought for Fleming's attorneys and law clerks are reasonable.

3. Total Amount of Fees

Fleming seeks an award of attorneys' fees as follows:

	<u>Attorney/Law Clerk</u>	<u>Amount of Hours</u>	<u>Hourly Rate</u>	<u>Total</u>
1	Feinberg	39.45	\$450	17,752.50
2	Springer-Sullivan	281.45	225	63,326.25
	Le	87.90	200	17,580.00
3	Cheng	10.65	200	2,130.00
4	Law Clerks	21.15	125	2,643.75
			<u>TOTAL:</u>	\$103,432.50

(See Springer-Sullivan Decl. Ex. 1; Springer-Sullivan Second Decl. Ex. 3.) As set forth above, the Court has disallowed fees for 2.85 hours of attorney time expended in preparing the case management statement. As that time was spent by attorney Le, the Court will deduct \$570 (2.85 x \$200/hour) from the total amount of fees sought. Also as set forth above, the Court has found that 2.15 hours of law clerk time were not reasonably spent; accordingly, the Court deducts an additional \$268.75 (2.15 x \$125/hour) from the total amount of fees sought.

Accordingly, the Court will award a total of \$102,593.75 in attorneys' fees.

B. Prejudgment Interest

Fleming seeks an award of prejudgment interest in the amount of \$4885.03. In the Joint Pretrial Statement, defendants conceded that "prejudgment interest may be awarded at the court's discretion if plaintiff prevails." (See Penrose Decl. Ex. H at 22.)

The Ninth Circuit has held that a district court may award prejudgment interest in ERISA cases to compensate a plaintiff for the loss he incurred as a result of the defendant's nonpayment of benefits. See Dishman v. Unum Life Ins. Co. of America, 269 F.3d 974, 988 (9th Cir. 2001). Whether to award prejudgment interest "is a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities." See Shaw v. International Association of Machinists, 750 F.2d 1458 (9th Cir. 1985). Appropriate considerations include whether the "financial strain" of paying prejudgment interest would injure other plan beneficiaries, and whether the defendants acted in bad faith. See id.; see also Dishman, 269 F.3d at 988. "Although a defendant's bad faith conduct may influence whether a court awards prejudgment interest, it should not influence the rate of the interest." See id. "[T]he interest rate proscribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of prejudgment interest

1 unless the trial judge finds, on substantial evidence, that the equities of that particular case
2 require a different rate.” Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1164
3 (9th Cir. 2001). The Court applies the interest rate that was in effect at the time payment
4 was due to the plaintiff, not the rate applicable as of the date of judgment. See Nelson v.
5 EG&G Energy Measurements Group, 37 F.3d 1384, 1391-92 (9th Cir. 1994).

6 Fleming argues that the Court should award prejudgment interest because
7 defendants acted in bad faith by denying her claim and would suffer no financial hardship if
8 they were ordered to pay interest. Defendants have not opposed Fleming’s request for
9 prejudgment interest.

10 As noted, the Court has not found that defendants acted in bad faith. Nonetheless,
11 the Court agrees that Fleming is entitled to an award of prejudgment interest. There is no
12 evidence that defendants would suffer any financial hardship by paying prejudgment
13 interest to Fleming, nor that any other beneficiary of the plans would suffer as a result.
14 Had defendants properly reviewed Fleming’s claim and focused on the effects of her pain
15 and her pain medication on her ability to function in her position as a financial analyst,
16 Fleming would have received long ago the benefits to which she is entitled. Fleming is
17 entitled to an award of prejudgment interest to make her whole.

18 Fleming requests an award of prejudgment interest at the rate that was in effect,
19 pursuant to 28 U.S.C. § 1961, at the time of each monthly payment defendants did not
20 make. (See Springer-Sullivan Decl. ¶¶ 25-26 and Exs. 9-10.) The rates requested are
21 appropriate, as is Fleming’s request that the interest be calculated as each payment
22 became due. See Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d at 1164 (holding
23 district court is to award prejudgment interest at rates set forth in 28 U.S.C. § 1961 “unless
24 the trial judge finds, on substantial evidence, that the equities of that particular case require
25 a different rate”); Nelson v. EG&G Energy Measurements Group, 37 F.3d at 1391-92
26 (holding courts should apply interest rate in effect at time payment was due). Fleming has
27 set forth a detailed chart setting forth her interest calculations, which counsel attests was
28 calculated using the computer program, “Interest Machine.” (See Springer-Sullivan Decl.

¶ 26 and Ex. 10.) The Court notes that Fleming's calculations are based on an assumption that she would receive benefit payments in specified amounts each month, and that no evidence to support her entitlement to the specified amount of those payments has been submitted to the Court. Defendants, however, have not taken issue with the calculations set forth in Fleming's briefing. Accordingly, the Court will assume that Fleming is entitled to disability benefits in the amounts set forth in Fleming's calculations. (See Springer-Sullivan Decl. Ex. 10.)

Accordingly, the Court will GRANT Fleming's request for prejudgment interest in the amount of \$4885.03.

CONCLUSION

For the reasons set forth above, it is HEREBY ORDERED that Fleming's motion for attorney's fees, costs, and prejudgment interest is hereby GRANTED in part and DENIED in part, as follows:

1. Fleming's request for attorneys' fees is GRANTED in part, in the amount of \$102,593.75.

2. Fleming's request for an award of costs under § 1132(g) is GRANTED in the amount of \$286.28, the amount of costs sought in excess of that sought in her bill of costs. The Court expresses no opinion as to whether Fleming is entitled to all of the costs itemized in her bill of costs, as that matter is currently pending before the Clerk.

3. Fleming's request for prejudgment interest is GRANTED, in the amount of \$4885.03.

This order terminates Docket No. 73.

IT IS SO ORDERED.

Dated: June 9, 2005

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge